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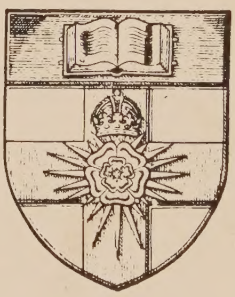

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The Right Hon. Hugh Holmes.
The Right Hon. Richard R. Cherry.

King's Bench Division.

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The Right Hon. Redmond J. Barry.

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CORRIGENDA.

Page 55, line 8 from foot, *for* "in" *read* "of".

,, 380, line 10, *for* "10" *read* "35".

,, 413, line 20, *for* "1889" *read* "1879".

,, 495, line 9 from foot, *after* "does" *read* "not".

NOTE.

The Court of Appeal have affirmed the following decisions of the King's Bench Division reported in this volume :—

MAYOR, &c., OF LIMERICK *v.* CROMPTON - - - - page 120

MURPHY *v.* BANDON CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY - - - - - - - - - - ,, 510

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MEMORANDA.

In November, 1909, MR. JUSTICE JOHNSON was created a Baronet.

At the close of Michaelmas Sittings, 1909, MR. JUSTICE ANDREWS and MR. JUSTICE JOHNSON resigned.

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1909.

NIXON *v.* LOUNDES (1).

K. B. Div. 1908. Nov. 26, 28.

Practice—Setting aside judgment—Fraud—Jurisdiction of the Court upon motion—Issue to try the question of fraud.

A Court of the King's Bench Division has jurisdiction, upon motion, to set aside a judgment, upon the ground that it is collusive and fraudulent against creditors of the defendant, provided that fraud is clearly proved; but where the evidence before the Court on the hearing of the motion is such as reasonably to suggest fraud, though not to establish it, the Court will direct an issue to try the question of fraud.

Per Gibson and Dodd, JJ.: The jurisdiction to set aside a judgment, or to direct such an issue, is part of the inherent jurisdiction of the Court, and does not depend on Order XXVII., Rule 17.

Per Kenny, J.: (1) The Court has inherent jurisdiction to deal with its own record at the instance of any party affected by it, when it is improperly placed on the files of the Court.

(2) The application of Order XXVII., R. 17, is not confined to ejectments.

Harrod v. *Benton* (8 B. & C. 217) followed. *Mehaffey* v. *Mehaffey* ([1905] 2 I. R. 292) and *Jacques* v. *Harrison* (12 Q. B. D. 165) discussed.

(1) Before Gibson, Kenny, and Dodd, JJ.

K. B. Div. 1908.

NIXON *v.* LOUNDES.

MOTION to set aside the judgment and all subsequent proceedings in an action, and for liberty to a judgment creditor of the defendant therein to intervene and defend the action in the name of the defendant, upon entering into security to indemnify the defendant against the future costs thereof.

The action was brought by Robert Nixon against Joshua Loundes, to recover £110 17*s.*, being arrears of wages due by the defendant to the plaintiff as general farm-servant, at £20 per annum up to and ending May, 1907, and for money on an account stated and settled.

The writ of summons was issued on July 1st, 1908, and was specially endorsed. The particulars given in the writ showed a balance of wages amounting to £123 due by the defendant to the plaintiff, the wages being calculated at £20 per annum, and, save as to £13, being for service from 1902 to May, 1907. Credit was given to the defendant for £7 3*s.* for tobacco supplied by the defendant to the plaintiff at the rate of £1 6*s.* per annum, between the years 1901 and 1907; and £5 for the value of a calf.

Judgment was entered against the defendant on the 7th August, 1908, in default of appearance, for £110 17*s.* and £5 16*s.* costs; and on the 12th August, 1908, the judgment was registered as a judgment mortgage upon the defendant's lands at Drumbo in the county Cavan.

On October 23rd, 1908, William Falkiner obtained judgment against the defendant for £30 18*s.* and costs, which judgment was, on October 24th, 1908, registered as a judgment mortgage upon the same lands.

The lands in question were put up for sale by the defendant on October 14th, 1908, at a public auction, and were knocked down at £325; but it was subsequently discovered that there were incumbrances on the lands in excess of that price, and the defendant was in consequence unable to complete the sale. The plaintiff, who had instituted an equity suit in the County Court for the purpose of realizing his judgment mortgage, thereupon proceeded with it, and obtained an order in the County Court for a sale of the land to be held on December 16th, 1908, the proceeds of the sale to be lodged in the County Court. There were four mort-

gages upon the lands in question superior to that of William Falkiner, the plaintiff being second mortgagee.

William Falkiner, knowing that if these mortgages were paid the proceeds of the sale would be insufficient to pay off his mortgage, warned the solicitor having carriage and the first mortgagee against paying any part of the proceeds of the intended sale to the plaintiff, and instituted the present motion.

An affidavit sworn by William Falkiner contained the following statements:—

"The plaintiff is a brother-in-law of the defendant, and is about thirty years of age. He lived with the defendant from childhood, and only left the defendant's house some eight years ago, when he went to England. He returned to the defendant some six years ago, and continued to live with him till May, 1907.

"The defendant has been for several years in serious monetary difficulties. . . . Prior to the service of the writ in this action I had a conversation in the defendant's house with the defendant's wife, who told me that her brother" (the plaintiff) "was putting in a claim against the defendant for £120 for wages. I expressed my surprise at such a claim, when the defendant's wife informed me that the reason he was putting in this large claim was that they" (meaning the defendant and his wife) "might save something out of the place."

"When living with the defendant, the plaintiff supported and clothed himself out of the profits of the farm, and any work done by the plaintiff was, I believe, done in return for such support. . . ."

An affidavit sworn by James Shera contained the following statement:—

"I noticed in the *Traders' Gazette* the judgment obtained by the plaintiff against the defendant for £110, and asked the defendant what was the meaning of it. He said he knew nothing about it, and that there was no such thing. At his request I showed him the entry in the *Gazette*. He informed me that Robert Nixon was his brother-in-law, but that he owed him nothing. I told him that it was a serious matter which he ought to see about; and he took away the *Gazette*, saying he would do so at once."

K. B. Div. 1908.

NIXON v. LOUNDES.

The allegations in the foregoing affidavits as to the statements made by the defendant and by his wife were not denied; but the solicitor for the plaintiff deposed to an admission by the defendant, when in the deponent's office, that the sum claimed in the action was due by him to the plaintiff.

The plaintiff's account of the defendant's indebtedness to him was described in an affidavit sworn by him, and may be summarized as follows:—

"About fourteen years ago I went to work for the defendant. I was then a boy; and he paid me £5 for the half year. I left him and went home. About six months afterwards he asked me to return. I did so, and remained with him for two or three years on the understanding, of course, that he was to pay me wages. There was no definite sum fixed. When I was leaving, we settled up, and I agreed to accept £15 for my time, he agreeing to pay me that sum. He had not the money then, save £2, which he gave me, leaving a balance of £13, which he undertook to pay me.

I then went to England, and remained there for a year and a half, or two years; and the defendant was continually writing to me, asking me to go back. I eventually went back to work for him, to be paid the regular rate of wages. I remained with him for five and a half years, and left in May, 1907. There was then due to me five and a half years' wages, at £20 a year, and £13 from the former account."

The plaintiff also described how the credit allowed in the writ had been calculated, and stated that he had left the defendant's employment in consequence of the defendant having broken a promise to pay the plaintiff his wages out of a legacy which the defendant had received, but had expended for other purposes. The plaintiff further stated:—

"The general rate of wages for men of my class is from £20 to £24 a year, and I have no difficulty in getting employment at the rate of £20 a year. I worked on the defendant's farm as a general farm servant."

The plaintiff denied that there was collusion between him and the defendant, and stated that he first became aware of the state

of the defendant's affairs at the date of the abortive sale of the defendant's farm.

In a second affidavit the plaintiff entered, at considerable length, into the details of the purchase of two colts and a calf, for the value of which William Falkiner alleged that the defendant should have been given credit in the action. The plaintiff's account of the matter was that these animals had been bought with money of his own, and were not a gift to him from the defendant.

No affidavit by the defendant or his wife was filed for the purpose of the motion.

E. S. Murphy, for William Falkiner:—

This judgment having been obtained by default, Ord. XXVII., Rule 17, applies, and the Court has jurisdiction to set it aside upon the ground of fraud: *Jacques* v. *Harrison* (1), *Mehaffey* v. *Mehaffey* (2).

D. S. Henry, K.C. (with him *W. E. Wylie*), for the plaintiff:—

I admit that the Court has jurisdiction to make the order asked for, but I submit that fraud has not been sufficiently established.

E. S. Murphy, in reply.

GIBSON, J.:— Nov. 28.

This is a motion by Falkiner, a judgment creditor of the defendant, to set aside a judgment by default obtained by the plaintiff against the defendant, dated 7th August, 1908, and registered soon afterwards as a judgment mortgage, and for liberty to defend the action in the defendant's name, indemnifying him. The plaintiff is a brother-in-law of the defendant, and the judgment debt represents a claim for unpaid wages for several years. Falkiner, the applicant, recovered judgment against the defendant on the 23rd October, 1908, for £30 18*s.*, for a debt due two years before, and registered the judgment as a mortgage next day. The motion to set aside the judgment is based on

(1) 12 Q. B. D. 165. (2) [1905] 2 I. R. 292.

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alleged fraud and collusion between the plaintiff and the defendant, there being no real debt at all, or, if there was, the amount being dishonestly exaggerated, the object being to defeat creditors. The defendant was in embarrassed circumstances during this period, and several other judgments were obtained against him. If the Court has jurisdiction to grant the present application, the evidence should be of the strongest character.

The motion is based by Mr. Murphy on a Court Rule, Order XXVII., Rule 17, as to default judgments, and on two decisions —*Jacques* v. *Harrison* (1), and *Mehaffey* v. *Mehaffey* (2). The scope of the rule is explained by Bowen, L.J., in 12 Q.B.D., at p. 170. It does not enable a third party in an ordinary action to set aside a judgment, or substitute himself as defendant. The present motion rests on fraud and the inherent jurisdiction of the Court over judgments vitiated by fraud. Whether such judgment is by default or consent, or otherwise, is immaterial.

Neither of the cases cited is in point. *Jacques* v. *Harrison* (1) only applies a familiar principle in ejectment procedure. It has no connexion with fraud. *Mehaffey* v. *Mehaffey* (2) is based on fiduciary relation, and merely decides that a *devastavit* or breach of trust cannot be answered by a fraudulent and collusive judgment. The person who gets a trustee to betray his trust cannot set up a judgment obtained to carry out that object as a defence to a beneficiary's application. Before judgment the executor could be compelled to defend, or at least allow a defence to be entered in his name, receiving an indemnity: *Re Wenham* (3). Where a judgment is submitted to by the executor without the knowledge or consent of the beneficiaries, and the claim is to the knowledge of both parties fictitious or non-enforceable, the beneficiaries are entitled to have the property misapplied under the judgment made good. The form of device by which the breach of trust is effected—deed, judgment, or otherwise—cannot affect the rights of the equitable owners or the jurisdiction of the Court. *Midgley* v. *Midgley* (4) and *Re Rownson* (5) exemplify the principle. Its application cannot be evaded by the pretence of a judgment.

(1) 12 Q. B. D. 165.
(2) [1905] 2 I. R. 292.
(3) [1892] 3 Ch. 59.
(4) [1893] 3 Ch. 282.
(5) 29 Ch. D. 358.

The question before us is different. Where there is no fiduciary relation, can a creditor apply on motion to set aside a judgment contrived to defeat creditors generally?

I am of opinion he could get relief in a substantive action on behalf of himself and creditors generally. The statute 10 Car. 1, sess. 2, c. 3, sect. 10, extends to fraudulent judgments as well as conveyances, and, apart from any statute, common law, which always regarded substance and reality, made such judgments inoperative against creditors. *Doe* v. *Carter* (1) illustrates the general principle. That a fraudulent judgment is void against creditors is shown by *Imray* v. *Magnay* (2) and *Shattock* v. *Carden* (3).

But can such judgment be removed from the record on motion? In the absence of authority I would have hesitated to introduce such form of relief for the first time. I find, however, that in *Harrod* v. *Benton* (4), upon a motion to set aside a judgment with execution on a warrant of attorney alleged to be fraudulent against creditors, the Court decided that in a clear case the judgment could be set aside on a creditor's motion, but that where the facts were not clear, there should be an issue to try the question of fraud. Had this decision been before the Court in *Mehaffey's Case* (5) I think the judgment there would have been set aside finally without any further pleading, as the plaintiff was found guilty of manifest fraud and collusion. The order there made was modelled on that in *Jacques' Case* (6), which, for the reasons already given, has no application here.

As an order in compliance with the present motion would involve complete destruction of the plaintiff's judgment and remedy, a conclusive case of fraud or collusion should be made out; but the uncontradicted admissions of the defendant and his wife are not legal evidence against the plaintiff, and on the proof, as it stands, there is not enough to justify the drastic course of setting aside the judgment.

The circumstances of the case are, however, suspicious; the admissions are relevant under Order XXXVIII., Rule 4, as to

(1) 8 T. R. 300.
(2) 11 M. & W. 267.
(3) 6 Ex. 725.
(4) 8 B. & C. 217.
(5) [1905] 2 I. R. 292.
(6) 12 Q. B. D. 165.

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the genuineness and substantiality of Falkiner's attack, and the facts are such as to enable Falkiner to have an issue on the question of fraud. Without any leave at all, he could bring a plenary action, and an issue is obviously more expeditious and economical. Possibly, on the authorities cited, Judge Drummond might be able to dispose of the matter in the equity suit now pending before his Court for realization; but he might decline to do so, and an issue is the obvious way of settling the question. It will not displace or postpone the plaintiff's security, and, when it is decided, the rights of the parties will be finally settled. Meanwhile the rest of the motion will be adjourned to abide the result, the plaintiff undertaking until further order not to deal with the mortgage pending the issue, and that any money receivable in respect of same should be retained in Court. Falkiner must speed the trial of the issue, which can be decided at an early day.

KENNY, J.:—

This application is to set aside a judgment on the ground of fraud and collusion, the case alleged being that the plaintiff's claim for wages was a sham one and that the defendant, being in embarrassed circumstances and anxious to save something out of the wreck of his property, connived with the plaintiff to allow judgment to go for a claim which did not exist, the object being to give that judgment and the mortgage registered under it a false priority.

If I were free from doubt as to the existence of the fraud I should hold, as unhesitatingly as I did in *Mehaffey* v. *Mehaffey* (1), that the judgment should be at once set aside; but the fraud or collusion is strongly denied in the present case—and while I think there are circumstances deposed to which, if proved by legal evidence, might establish fraud, still the evidence before us is not such as I could act on to the extent of now setting aside the judgment. It is, however, enough, in my opinion, to put the Court on inquiry, and I agree in thinking that we ought to direct some proceeding to be taken in order to have the question decided.

(1) [1905] 2 I. R. 292.

In my opinion, under Order XXVII., Rule 17, a person in the position of Mr. Murphy's client is entitled to claim the right to intervene, provided he can show that the judgment, if it stands, will affect his rights and interests in property and that there are reasonable grounds for impeaching it. It is plain to me that *Jacques* v. *Harrison* (1) recognized this construction of the General Order, without confining its application merely to ejectments. But, independently of the General Order, I think there can be no doubt that the Court has inherent jurisdiction to deal with its own record, at the instance of any party affected by it, when it is improperly placed on the files of the Court.

I wish to say a word as to the form of the order in *Mehaffey* v. *Mehaffey* (2), to the making of which I was a party. We there followed the form in *Jacques* v. *Harrison* (1). The effect of our order was to deprive the plaintiff of his judgment, and all benefit accruing from it, but not to restrain further proceedings in the action. But in letting in the intervenient to defend, we simply followed the form in that case, and I do not think that the additional considerations which have been evolved in the present case were then present to our minds.

DODD, J.:—

The applicant is a person who has got a valid judgment of this Court. He alleges he is injured, inasmuch as there is a judgment of this Court in the way of his realizing his judgment, and he contends that the judgment so in his way is fraudulent and collusive, for the purpose of defeating and delaying himself and other creditors of the defendant.

One of the questions that lies at the threshold is this: Has this Court jurisdiction, on a summary application by a person not a party to the action in which the motion is made, to grant relief? Unless the Court has jurisdiction the application must fail. Mr. Henry does not dispute that the Court has jurisdiction; but, on a matter of this kind, it is desirable for the Court to be satisfied as to its own authority. There are two steps in the process. The first is the judgment itself, and the second is the registration of the judgment in the Deeds Office as a mortgage. The applicant

(1) 12 Q. B. D. 165. (2) [1905] 2 I. R. 292.

K. B. Div. 1908. NIXON v. LOUNDES. Dodd, J.

is not, in fact, hurt, he says, by the judgment; but he is hurt by the registration of it, as it gives priority against the defendant's lands over his own charge, his judgment also having been registered, but his judgment, and the registration of it, being later in date than the date of the alleged collusive judgment. Under the Judgment Mortgage Act the operation is the same as if the defendant had assigned his interest in the farm to the plaintiff in the prior judgment. The applicant says that the judgment, being entered up, is only part of a proceeding which is a fraudulent device to give the apparent sanction of the Court to the transaction. The same result would have been accomplished if the defendant had given a mortgage to the plaintiff for the amount of the alleged indebtedness; and, just as the mortgage could be challenged, so the entire transaction that resulted in a statutory mortgage can be challenged. If this Court were satisfied that its processes were being so used for so dishonest a transaction, it is hard to see why it could not protect itself from being made a cloak to cover such a fraud.

Lord Campbell, in *Remmett* v. *Lawrence* (1), expressed a wish to have the case of *Imray* v. *Magnay* (2) reconsidered; but that reconsideration would have affected only the position of the sheriff. It does seem hard on a sheriff to put on him to determine whether a prior execution is, or is not, a nullity by reason of fraud. *Harrod* v. *Benton* (3)—the case that the research of my brother Gibson has found—is conclusive; and I may add that in another case even earlier in date—*Warmoll and Another* v. *Young* (4)—this course is expressly pointed out as the correct procedure. Holroyd, J., says:—"It is the duty of the sheriff to retain the money in his hands, in order to allow parties to apply to the Court to set aside an execution which may be sued out for fraudulent purposes." I think the jurisdiction is part of the inherent jurisdiction of the Court. The Rules of Court relied on by Mr. Murphy are not, in my opinion, applicable in the way he seeks to use them here.

Speaking for myself only, I think the whole proceeding must be set aside, if at all, on the ground that it is an abuse of the

(1) 15 Q. B. 1004.
(2) 11 M. & W. 267.
(3) 8 B. & C. 217.
(4) 5 B. & C. 660.

process of the Court. If the judgment is fraudulent, it should not stand in the way of an honest judgment. I can see no authority for allowing the applicant in to defend in the name and on behalf of the defendant. This is not, to my mind, at all within the decision in *Mehaffey* v. *Mehaffey* (1), or the English case on which it is founded. The decision in neither of those cases turned upon a fraudulent abuse of process. It turned upon the interest of persons other than the named defendant in the subject-matter of the litigation. The judgment is, in any event, good against the defendant, and he could not be listened to now impugning it. When a conveyance fraudulent as against creditors is set aside on that ground, it is still good *inter partes*.

I am of opinion, therefore, that the Court has jurisdiction to sweep the judgment, and the statutable mortgage founded on it, off the records, on the ground that the whole proceeding is an abuse of process. But that can only be done on proof: fraud must be clearly alleged and clearly proved. The facts relied on here fall short of establishing such a case as, on a plenary hearing, would enable a Court to make a decree. It remains to consider whether the case is one in which we should direct an issue to be tried. I am not without doubt as to whether some more affirmative evidence should not have been given directly to bring home fraud to the plaintiff; but, as the issue has to go, I will not dwell upon the evidence. I do not dissent from the other members of the Court in directing it. When a *bona fide* application is made on fair grounds, that the process of this Court is being made an instrument of fraud, the Court should be astute to see that the person aggrieved gets a remedy.

The curial part of the order was as follows:—

> "IT IS ORDERED that the following issue shall be tried before a Judge and jury at the next Cavan Spring Assizes, in which the said William Falkiner shall be plaintiff and the said Robert Nixon shall be defendant. The question on the trial of the said issue shall be, Whether or not the judgment in this action, dated the 7th August, 1908, for £110 17*s*., and £5 16*s*. costs, was wholly, or to any and what extent, fraudulent, and with intent to defeat creditors.

(1) [1905] 2 I. R. 292.

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"AND IT IS FURTHER ORDERED that the motion on the part of the said William Falkiner be adjourned until the said issue shall have been disposed of, or until further order, and that the costs of the said issue and of this motion be reserved for the decision of the Court on such motion, when heard; the said plaintiff, Robert Nixon hereby undertaking not to deal in any way with the judgment or judgment mortgage, and that any money receivable in respect thereof shall be retained in the Equity suit pending before His Honour Judge Drummond until the said issue be disposed of, or until further order, without prejudice to the said plaintiff Robert Nixon, while having carriage of the said Equity suit, doing all necessary acts in relation to such carriage; and the said William Falkiner hereby undertakes to speed the trial of the said issue.

"AND IT IS FURTHER ORDERED that a copy of this order be lodged with the Clerk of the Crown and Peace for the county of Cavan."

Solicitor for William Falkiner: *Charles E. Murphy.*
Solicitor for the plaintiff: *Louis C. Smith.*

J. C. W.

MARTIN *v.* THE DUBLIN UNITED TRAMWAYS CO., LIMITED (1).

K. B. Div. 1908. Nov. 10, 11, 17.

Negligence—Action for—Tramway Company and passenger—Liability for accident occasioned by passenger going upon platform while car is in motion —Volenti non fit injuria—*Effort to stop car in order to alight—Stopping-places—Absence of conductor from platform—Disregard of passenger's signal.*

A passenger on a tramcar who, while the car is in motion, leaves his seat, and, in the absence of the conductor, goes upon the platform for the purpose of stopping the car by ringing the bell, does so at his own risk, in regard to an accident caused by the ordinary motion of the tramcar.

M., a passenger on a tramcar, the property of a Tramway Company, told the conductor shortly after he entered the car that he wished to alight at B. Avenue, a place then about two miles distant. There was no evidence that M. subsequently spoke to the conductor on the subject. When the car reached B. Avenue, the conductor was on the roof collecting fares. The car was travelling at a rapid, but not excessive, pace, and continued its course. M., in the absence of the conductor, left the interior of the car, and went out on to the platform to stop the car by ringing the bell. While he was doing so, the car swerved, and he was jerked from the platform to the road, sustaining injuries. The swerve which caused M.'s fall was not exceptional, nor was there anything defective in the machinery or construction of the car. There was no evidence that M. gave the proper signal for stopping the car. B. Avenue was a place where cars were stopped on request, but not otherwise.

In an action by M. against the Tramway Company for negligence:—

Held, (1) that, in the absence of reasonable notice to the conductor of the plaintiff's wish to alight, there was no evidence of negligence on the part of the conductor; (2) that, even assuming that both the conductor and the driver were negligent in not stopping the car, such negligence on their part was not the proximate cause of the accident to the plaintiff.

Held, also, by Boyd and Wright, JJ., that the driver was not negligent, there being no evidence that the proper signal for that purpose was given to him.

Roscoe v. *Dublin United Tramways Co.* (unreported.—C. A., November 10, 1905; *infra*, pp. 15 and 16, note) followed. *Hall* v. *London Tramways Co.* (12 T. L. R. 611) distinguished.

(1) Before ANDREWS, BOYD, and WRIGHT, JJ.

K. B. Div. 1908.

MARTIN v. D. U. T. Co.

CASE STATED by Mr. Justice Kenny on the hearing of an appeal from a decree of the Recorder of Dublin as follows :—

"The civil bill was brought for recovery of damages for alleged negligence resulting in personal injury. The Recorder gave a decree for £21 damages and costs, dated 3rd February, 1908. Before me the plaintiff examined two witnesses, namely, himself and Professor Barrett, of the Royal College of Science, who was a passenger in the tramcar, and witnessed the occurrence. No witness was examined on behalf of the defendant company; and there was no controversy as to the facts, which I find as follows:—

"The plaintiff entered one of the defendants' cars which was proceeding to Dalkey on the afternoon of the 11th September, 1907, at the corner of Nassau Street and Grafton Street. He wished to alight at a place called Beechmount Avenue, near Sydney Parade, and so informed the conductor when he came round to collect fares. When the car reached Beechmount Avenue, it was proceeding at a rapid pace; it passed the avenue and continued its course for some way. The conductor at that time was on the roof collecting fares. The plaintiff, seeing that the car was not about to stop where he wanted to alight, left his seat and proceeded to the platform, where he commenced ringing the bell to attract the attention of the driver.

"Notwithstanding this, the car did not stop, and the conductor was still on the roof. While the plaintiff was actually pulling the bell, the car gave a little swerve or jerk, and the plaintiff fell off the platform on to the road, and sustained the injuries in respect of which he sued.

"There was no suggestion that the car was proceeding at an undue rate of speed, or that there was anything irregular in the driving or machinery. The swerve or jerk was not of an exceptional nature. The force of even a small jerk or swerve is felt more when standing on the platform than in the car itself. There are side supports or bars on the platform of the Dalkey cars, which the passengers can hold when alighting or boarding the car, or when standing on the platform. In other cars belonging to the company an upright brass bar divides the opening of

the platform, and thus affords an additional hold for a passenger. The Dalkey cars are not provided with this upright bar.

"Several of the 'white posts' which are supposed to represent stopping-places were passed by the car after it left the corner of Beechmount Avenue. These white posts are only indicative of possible stopping-places. Between them the cars do not, in ordinary circumstances, stop at all; at the posts the cars stop if a passenger shows he wishes to alight or to board the car.

"There was no question as to the amount of the damages if the action was sustainable.

"When the defendants' case was opened before me, Mr. A. M. Sullivan, who appeared as counsel for the defendants, contended that there was no evidence of actionable negligence, and that the case was covered by the authority of *Roscoe* v. *D. U. Tramways Co.* (1) in the Court of Appeal. I had the Registrar's Book brought over with Mr. de Versan's valuable *précis* of the case—when Mr. Sullivan stated his position to be that no passenger had

(1) ROSCOE *v.* THE DUBLIN UNITED TRAMWAYS CO., LTD.

This was an appeal from an order of the King's Bench Division (Andrews, Gibson, and Boyd, JJ.), remitting the action for trial before the Recorder of Dublin. The motion was heard in the King's Bench Division on the 3rd November, 1905, and the appeal was heard by FitzGibbon, Walker, and Holmes, L.JJ., on the 10th November, 1905.

The action was brought to recover damages in respect of an accident which happened to the plaintiff while a passenger on one of the defendant Company's tramcars, and the facts relied on as establishing negligence were thus described in an affidavit sworn by the plaintiff:—"It is untrue that I stated to any person that I was in the act of getting off the car when the accident occurred. There are white posts at each side of Buckingham Street, indicating a stopping-place for the trams; and, as I intended to get out there, I left my seat with the object of requesting the conductor to stop the tram. The conductor was not on the platform; and as soon as I reached the platform, the tram, instead of stopping, seemed to increase its speed, and gave a sudden lurch. I was thrown with great violence to the ground, and being rendered unconscious, I remembered nothing more till late that evening." This was the only description of the accident which was given in any of the affidavits filed for the purpose of the motion. It was, however, stated in an affidavit made by the manager of the defendant Company, that the conductor was on the top of the car when the accident occurred.

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a right to leave his seat while the car was in motion, and that if he did so, it was at his own risk.

"Mr. Timothy Sullivan appeared for the plaintiff, and argued that the fact of the plaintiff having stated he wanted to alight at Beechmount Avenue, and the further fact that he rang the bell for the driver of the car to stop, distinguished the case from *Roscoe* v. *D. U. Tramways Co.*

"In opposition to Mr. A. M. Sullivan's view, that no passenger should, unless at his own risk, leave his seat or come upon the platform until the car stopped, I thought that occasions might arise when it might be necessary for a passenger to leave his seat —for instance, to get the car stopped by communicating with the conductor. It might be that the passenger was seated at the upper end of the car, and wanted to get out at a particular place, and could not catch the conductor's eye: was he to remain there unless he chose to leave it at his own risk? It seems to me that the proposition went too far.

The Court of Appeal affirmed the decision of the King's Bench Division, the judgment of the Court being as follows:—

FITZGIBBON, L.J.:—

I deal with the case entirely on the question whether, on the affidavits as they stand, there is *prima facie* evidence of actionable negligence against the defendant Company, without considering the question of contributory negligence on the part of the plaintiff. The facts are simple. We can not, to meet the suggestions of the plaintiff's counsel, reform the system of the tramway traffic, and say that every white post marks a place where preparations should be made by the conductor for every potential passenger's getting in or out. The plaintiff left his seat while the car was in motion, with the object of asking the conductor to stop it. The conductor was not on the platform. There is no evidence of anything unusual, or improper, or negligent in the manner in which the service was being conducted. The only evidence is that the conductor was not on the platform, and that the car gave a sudden lurch, and the plaintiff was thrown off.

To hold that, under such circumstances, there is *prima facie* evidence of negligence would involve the necessity of a change in the known system of management. Dealing with the tram service as it exists, I cannot hold that there is *prima facie* evidence of negligence in the mere fact that the conductor is not on the back platform at the moment when a passenger wants to alight, or that the car while in motion gives a lurch.

"I offered the parties to state a case for the opinion of the Court which they accepted.

"The question for the Court is whether the circumstances disclose a case of actionable negligence on the part of the defendants.

"If the answer be in the affirmative, the decree of the Recorder is to be affirmed with costs. If in the negative, the decree is to be reversed, and the civil bill discharged with costs of appeal and in the Court below."

W. G. Gibson (*A. M. Sullivan, K.C.*, with him), for the defendant Company:—

There is no evidence of negligence on the part of the driver or conductor. Kenny, J., does not find that the plaintiff gave the proper signal to have the car stopped. In the absence of reasonable notice of the plaintiff's desire to alight at Beechmount Avenue, the conductor was not bound to be on the platform. In any case, it was the negligence of the plaintiff himself, and not that of the Company's servants, which caused the accident. It was not caused by the absence of the conductor from the platform, or the driver's failure to stop the tram. The plaintiff acted at his own risk. "In travelling on a tramcar it is the duty of the passenger to place himself in a safe position in that portion of the car set apart for passengers. It is no excuse for his placing himself in an unsafe or unusual position, when the unsafeness is known to the passenger, that the driver or conductor does not dislodge him therefrom. Thus the footboard of a car is not a proper place for passengers to ride on, and is obviously less safe than a seat inside": Beven on Negligence, vol. ii., p. 996. This case is ruled by *Roscoe* v. *The Dublin United Tramways Co.* (1).

Timothy Sullivan, for the plaintiff:—

The conductor was negligent in not stopping the car at the place where the plaintiff had said that he wished to alight. This is not a case of a passenger travelling on the platform. The plaintiff only went there after the conductor had failed in his

(1) See *ante*, p. 15, note.

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duty to stop the tram. The defendant Company does not provide any means of enabling a passenger in the interior of a car to communicate with the driver; and, therefore, a passenger must go upon the platform if the conductor is not there to stop the tram. The circumstances of this case show, in effect, an invitation by the defendant Company to the plaintiff to go on the platform. *Roscoe* v. *Dublin United Tramway Co.* (1) is distinguishable. In that case there was no evidence that the plaintiff had made a request to have the tram stopped.

There is also evidence of negligence on the part of the driver; he did not stop the car when the bell was rung. In the absence of evidence to the contrary, it must be assumed that he heard the bell.

If the conductor had been on the platform at Beechmount Avenue, or if the driver had stopped when the bell was rung, the accident would not have happened. The accident is directly traceable to their negligence.

The facts of this case are similar to those of *Baird* v. *South London Tramways Co.* (2) and *Folkes* v. *North London Railway Co.* (3). It was held in those two cases that there was no evidence of negligence on the part of the defendants, but the former has been expressly overruled, and the latter cannot now be regarded as correct. In *Hall* v. *London Tramways Co.* (4), Lord Esher, M.R., said, in delivering judgment:—"As regards the case of *Baird* v. *South London Tramways Co.* (2), it was clearly wrong, and must be overruled. As to *Folkes* v. *North London Railway Co.* (3), in his opinion it was nearly as wrong as the other case, but it was not necessary to overrule it."

[He also cited *Thomson* v. *Dublin United Tramway Co.* (5).]

A. M. Sullivan, K. C., in reply:—

The cases cited in support of the plaintiff's case are cases of "invitation to alight." There is no evidence of such an invitation in the present case.

(1) See *ante*, p. 15, note.
(2) 2 T. L. R. 756.
(3) 8 T. L. R. 269.
(4) 12 T. L. R. 611.
(5) 36 Ir. L. T. R. 186.

ANDREWS, J.:—

This is a case stated by Kenny, J., on an appeal from a decree of the Recorder of Dublin in a civil-bill action to recover damages for negligence, and the form of the question for our decision renders it necessary for me to refer to the evidence which has been embodied in the case stated.

The question is "whether the circumstances" (that is the facts stated in the case) "disclosed a case of actionable negligence on the part of the defendants."

On the 11th September, 1907, the plaintiff was a passenger in one of the defendant's tram cars proceeding to Dalkey. He got into the car at the corner of Nassau Street and Grafton Street, and when the conductor came to collect the fares he told him that he wished to alight at Beechmount Avenue, which is near Sydney Parade, and is, as we know, a considerable distance out of Dublin. The exact time when this communication was made to the conductor is not stated, but I presume that it must have been soon after the plaintiff entered the car, and therefore at a considerable distance from the place where the plaintiff wished to alight. The case states (and this is important) that "when the car reached Beechmount Avenue it was proceeding at a rapid pace, passed the Avenue, and continued its course for some way," still travelling, as I infer, at or about the same pace. The case then proceeds as follows:—

"The plaintiff, seeing that the car was not about to stop where he wanted to alight, left his seat and proceeded to the platform, where he commenced ringing the bell to attract the attention of the driver. Notwithstanding this, the car did not stop" (and apparently was still going at a rapid pace), "and the conductor was still on the roof. While the plaintiff was actually pulling the bell, the car gave a little swerve or jerk, and the plaintiff fell off the platform on to the road," and sustained the injuries he complained of.

There was nothing exceptional in the swerve which the car gave. It is scarcely possible that such a car should run perfectly smoothly; and there is no suggestion of negligence on the part of the defendants in relation to the swerve. The case proceeds:—"There was no suggestion that the car was proceeding at an

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undue rate of speed, or that there was anything irregular in the driving or machinery. The swerve or jerk was not of an exceptional nature. The force of even a small jerk or swerve is felt more when standing on the platform than in the car itself." There was no suggestion that the construction of the car was faulty, or that the defendants were, in that respect, guilty of any negligence.

The case states that several "white posts" were passed by the car after it passed Beechmount Avenue; and that "these white posts are only indicative of possible stopping-places. Between them the cars do not in the ordinary circumstances stop at all. At the posts the cars stop if a passenger shows he wishes to alight or to board the car."

These are, in substance, the material facts of the present case, and it is said that they disclose evidence of negligence which distinguishes this case from the case of *Roscoe* v. *The Dublin United Tramways Co.* (1). In the latter case there was no intimation of a wish to alight given by the passenger to the conductor, nor was the bell rung by anyone, and it is contended that in that way *Roscoe's Case* (1) is distinguished from the present case. The plaintiff in the present case contends that there was negligence, in the first place, on the part of the conductor in not complying with his request to stop the car at Beechmount Avenue; and, secondly, that there was negligence on the driver's part in not stopping the car when the plaintiff rang the bell.

Mr. Timothy Sullivan, for the plaintiff, referred to *Hall* v. *London Tramways Co., Ltd.* (2), which overruled two previous decisions—*Baird* v. *South London Tramways Co.* (3) and *Folkes* v. *North London Railway Co.* (4). In *Hall's Case* (2) the Court of Appeal in England held that the evidence given in it was sufficient to fix the Tramway Company with liability for negligence by their servants; but I think the distinction between that case and the present is very clearly shown by the passages which I shall now read from the judgment of Lord Esher, M.R., who presided in the Court of Appeal. He said:—"The defendants undertook to carry passengers in their tramcar, and to stop and

(1) See *ante*, p. 15, note.
(2) 12 T. L. R. 611.
(3) 2 T. L. R. 756.
(4) 8 T. L. R. 269.

let them down when asked to do so. The plaintiff wanted to get out, and the conductor rang the bell" (in the present case the bell was not rung by the conductor). "The driver disregarded the signal" (in this case there is no evidence that the proper signal to stop was given). "The conductor, without waiting for the answer to the signal, went on the top of the car. The plaintiff was bound to act for herself, and rang the bell. The driver then slowed down almost to a stand-still." (That would indicate clearly to the passenger that the signal had been recognized and was being responded to, and that she might get ready to alight, which she was practically invited to do.) The judgment continues —"The plaintiff went out upon the footboard, and the driver, without bringing the car to a stop, suddenly went on quicker, and the plaintiff was thrown on the ground and injured."

I think that the decision in *Hall's Case* (1) was based on facts so different from those before us that it cannot be held to rule the present case.

It is said that there was negligence in the present case on the part of the conductor, but the request to stop the car was made to him a long time before the car reached Beechmount Avenue, and I would not myself be inclined to hold that the forgetfulness of the conductor, in such circumstances, considering his numerous duties on a journey, was so unreasonable as to amount to such negligence as would make the Company responsible.

As to the conduct of the driver, I think a distinction might be drawn between his conduct and that of the conductor. A signal was apparently given which, it might be said, we should, on the facts stated, assume to have been a proper signal to stop the car; and it might thus be argued that, on that assumption, there would be evidence of negligence on the part of the driver in not responding to the signal. But even reading the evidence in the way most favourable to the plaintiff, and assuming that there was some evidence of negligence on the part of the driver and the conductor, I am of opinion that there is no natural or reasonable connexion between it and what directly caused the accident, namely the act of the plaintiff himself. The only natural and

(1) 12 T. L. R. 611.

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reasonable result of such negligence would be the inconvenience to the plaintiff of being carried some distance beyond his destination. In order to save himself from this temporary inconvenience, the plaintiff left the interior of the tram—not to escape from any danger—and without invitation went out upon the platform and commenced to ring the bell, thereby tending to unsteady himself and place himself in a position of danger. I think that, even if there was negligence on the part of the defendants' servants, it could not be regarded as a natural and reasonable consequence of such negligence that the plaintiff would place himself in the position of danger, to which he voluntarily and without invitation exposed himself, to avoid the temporary inconvenience of being carried some distance beyond where he wished to alight; and I therefore think that this question in the case ought to be answered in the negative.

BOYD, J.:—

I concur. It is part of the plaintiff's case that on getting into the car, or shortly afterwards, he intimated to the conductor that he wished to get out at Beechmount Avenue, which, we all know, is a long way from Nassau Street. Many passengers must have got into and left the car in the course of its journey between these two places; and there is no evidence that, after his first intimation to the conductor, the plaintiff ever again spoke to him of his desire to have the car stopped at Beechmount Avenue. In my opinion we ought not impose on the defendants, or their servants, the responsibility of remembering orders that a passenger may give them, unless such order be given within a reasonable time before the passenger may desire to leave the car.

It is said that, as the conductor was not on the platform when the car reached Beechmount Avenue, it was the plaintiff's right to go out on the platform and ring the bell; but the bell is placed in a position to be used by the conductor and not by passengers. In the present case, however, the plaintiff, though he had given no notice of his desire to alight at Beechmount Avenue, except when he had just entered the tram, chose to go out on the platform and ring the bell in the absence of the conductor. There are well-known and distinctive signals for stopping and for going

ahead, and there is no evidence that he gave the proper signal to stop. We cannot go so far as to hold that a driver is bound to answer every and any signal which a passenger may give. Instead of waiting till the conductor came down from the top of the tram, the plaintiff chose to run the risk of an accident by doing what he had no right to do, namely, leaving the interior of the car and going on to the platform for the purpose of ringing the bell.

In *Roscoe* v. *Dublin United Tramways Co.* (1) the plaintiff went on to the platform when the car had slowed before coming to a stopping-place, but, even in that case, it was held that she did so at her own risk. In the course of the argument in that case, Holmes, L.J., said, referring to the case of a car in motion, "A person who stands up and walks on to the platform does so at his own risk"; and Fitz Gibbon, L.J., added—"She" (*i.e.*, the plaintiff) "has no right to go to any place where she was likely to fall into the street by a jerk of the car."

In that case it was held that the fact of the conductor not being on the platform when the car reached a "white post" was not evidence of negligence on the part of the Tramway Company. The case is unfortunately not reported, and for our knowledge of it we are indebted to Mr. de Versan, from whose valuable notes of decisions in the Court of Appeal I have taken the extracts which I have read.

WRIGHT, J. :—

I also concur. The facts have been so fully dealt with by Andrews, J., that I shall only refer to one passage in the case stated. It is as follows :—"There was no suggestion that the car was proceeding at an undue rate of speed, or that there was anything irregular in the driving or machinery. The swerve or jerk was not of an exceptional nature." Beyond this I do not think it necessary to refer to the evidence. In my opinion there is no evidence of negligence on the part of the conductor; there was no duty on his part as servant of the Company to stop the car, or cause it to be stopped, at the exact spot at which plaintiff had previously told him that he wished to alight. Further, I am of

(1) See *ante*, p. 15, note.

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opinion that there is no evidence of negligence on the part of the driver. The ringing of the bell does not necessarily convey to the mind of the driver that he is requested by the conductor or a passenger to stop the car—assuming that he heard the bell, he was not bound to pull up the car. But apart from these two matters, and assuming there was evidence of negligence on the part of either or both of these servants of the defendants, I am of opinion that the plaintiff, a passenger in the car, had no right, in the absence of the conductor, who was on the roof collecting fares, to leave the inside of the car and come out on to the platform—to exchange a position of safety for one of insecurity—and attempt himself to regulate and check the progress of the car. I am of opinion that there is no proper logical connexion between the absence of the conductor on the roof and the accident whereby plaintiff fell to the ground and sustained injury. It (the accident) is not the natural necessary consequence of the negligence, if any, of defendants' servant.

The injury was the consequence of plaintiff's own act, natural perhaps under the circumstances, but voluntary and one for the results of which he alone is responsible.

Solicitor for the plaintiff: *Thomas J. Furlong.*

Solicitor for the defendant company: *Gerald Byrne.*

J. C. W.

KING, APPELLANT; RUSSELL, RESPONDENT (1). *K. B. Div.* 1908.

Fishery Acts—Possession of salmon in close season—Salmon caught by net in close season for netting, but open season for angling—5 & 6 Vict. c. 106, s. 36. Nov. 9, 12.

It is an offence under sect. 36 of 5 & 6 Vict. c. 106, for a person to expose for sale, or have in his custody or possession, salmon caught by net during the close season for net-fishing, notwithstanding that at the time of his exposing them for sale, &c., angling for salmon by rod and line is lawful.

CASE STATED by the Justices under 20 & 21 Vict. c. 43.

At a Petty Sessions held for the Petty Sessions district of Ballymena, Co. Antrim, the respondent was charged on a summons, under 5 & 6 Vict. c. 106, s. 36, on the complaint of the appellant, "for that the defendant on the 10th day of October, 1907, at Church Street, Ballymena, in the County of Antrim, within the Coleraine district of fisheries, did expose for sale, or had in his custody or possession, four salmon, wilfully taken by net during the annual close season for catching salmon by net within said district and contrary to the statute."

On the hearing of the summons the appellant deposed that he was inspector of water-bailiffs for the Coleraine district. He handed in the order defining the Coleraine district of fisheries, showing that Ballymena was in the Coleraine district. He also handed in duly certified copies of by-laws of the 15th December, 1856, and the 12th September, 1894, made by the Fishery Commissioners. By the by-law of the 15th December, 1856, it was ordered that the annual close time during which it should not be lawful to kill, destroy, or take fish of the salmon kind in or from any river or lake above the tideway within the Coleraine district with nets and all other engines, save rods and lines only, should be between the 20th day of August in each year and the last day of February in the following year, both said days inclusive; and it was

(1) Before GIBSON, MADDEN, and KENNY, JJ.

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KING, *Appellant*; RUSSELL, *Respondent.*

thereby further ordered that the annual close time during which it should not be lawful to kill, destroy, or take fish of the salmon kind in or from any part of any river or lake within the said district of Coleraine with rods and lines only, should be between the 29th day of September in each year and the last day of February in the year following, both said days inclusive. The by-law of the 12th September, 1894, ordered that the annual close time during which it should not be lawful to fish for, kill, destroy, or take salmon or trout in the Coleraine district (save the rivers Maine and Blackwater) with single rods and lines only, should be between the 1st day of October in each year and the last day of February in the year following, both said days inclusive; and it was thereby further ordered that the annual close time during which it should not be lawful to fish for, kill, destroy, or take salmon or trout in the rivers Maine and Blackwater with single rods and lines only, should be between the 1st day of November in each year and the last day of February in the year following, both said days inclusive. The appellant further deposed that salmon taken by a set-net are marked round the neck and in front of the gills by the mesh of the net, and that there would be no such marks on a salmon taken by rod and line; that there was no fishery open in Ireland for the taking of salmon by net in the month of October; and that there were only two rivers, the Maine and the Blackwater, open in the Coleraine district in the month of October for taking salmon by rod and line.

Another witness deposed that he visited respondent's premises, in Church Street, Ballymena, on the 10th October, 1907, and found there four salmon exposed for sale, about 7 lb. to 11 lb. weight each. They were quite fresh, and appeared to be about twelve hours out of the water. Each of the salmon had net-marks on the back of the gills, and had been taken by net. There were no other marks, either by hook or gaff, on them. Witness spoke to respondent's shopman, and showed him the net-marks on the fish.

No evidence was tendered on behalf of the respondent, or any explanation offered, as to how or from whom he got the fish. His solicitor contended that the annual close season referred to in section 36 of 5 & 6 Vict. c. 106 meant the annual close season for

all engines, including both nets and rod and line, and that such close season did not begin in the said district until the 1st November in each year, and that consequently the fact of the respondent having in his custody or possession the four salmon during the month of October was not an offence.

The Justices found as a fact, on the evidence and documents before them, that the salmon which the respondent had in his possession were illegally caught by nets in the Coleraine district during the annual close season fixed for the capture of salmon by net in the Coleraine district, and were exposed for sale by respondent; but they decided that the annual close season referred to in section 36 of the 5 & 6 Vict. c. 106 is the annual close season for all engines, rod and line as well as nets, and that such close season began on the 1st November; and they consequently dismissed the complaint on the merits, but, on the application of the complainant, stated the present case, requiring the judgment of the Court as to whether they were right in their determination.

D. S. Henry, K.C. (with him *Hanna*), for the appellant:—

Where, as in the present case, the close season for taking salmon by nets is different from that for taking them by rod and line, the provisions of section 36 of 5 & 6 Vict. c. 106 must be read distributively, and it is therefore an offence to expose for sale, or have in one's custody or possession, a salmon caught by net during the close season for net fishing, notwithstanding that at the time of such exposing for sale, &c., angling for salmon by rod and line is lawful. There is, no doubt, a statement in Conner's Fisheries (Ireland) Acts (2nd ed., p. 35), that this is apparently no offence; but no authority is cited for the proposition. [He referred to 5 & 6 Vict. c. 106, s. 33; 32 & 33 Vict. c. 92, s. 15; *Devlin* v. *Hurst* (1); *Price* v. *Bradley* (2).]

James Henry, for the respondent:—

The close season referred to in section 36 of 5 & 6 Vict. c. 106 means the close season common to both net-fishing and rod-and-line fishing. This construction is borne out by the proviso in the

(1) [1897] 2 I. R. 290. (2) 16 Q. B. D. 148.

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section, that proof that a person has a salmon or trout in his possession during the close season shall be *primâ facie* evidence that such fish was caught during the close season. There is no finding here that the respondent knew that the salmon were taken by net. If the contention of the appellant is right, any person buying a salmon at a time when rod-and-line fishing is permitted, but net-fishing prohibited, would be liable to be convicted under the section, unless he could show that the salmon was, in fact, caught by rod and line. [He referred to *Ransome* v. *Mannix* (1).]

Cur. adv. vult.

Nov. 12.

GIBSON, J. :—

The close season for net-fishing is earlier and longer than the close season for angling, though from the 1st November the two seasons coincide. The question for decision is, whether exposing for sale salmon proved to have been caught by net during the former close season, and before the latter season began, is an offence within sect. 36 of 5 & 6 Vict. c. 106. That section, when it was enacted, contemplated but one close season in the district for salmon, however caught, though such close season might be altered under sect. 33, 13 & 14 Vict. c. 88, s. 1, and subsequent legislation. Under section 36, if there had been no legislation authorizing a shorter close season for angling purposes, the defendant would have been guilty of the offence charged. Under 26 & 27 Vict. c. 114, s. 23, amended by 32 & 33 Vict. c. 92, another and later close season was appointed for rod-fishing. This was a species of exception from the previous general close season, and the net close season was not thereby curtailed. The Justices have held that the close season to which section 36 now applies is so much of the close season as is common to both net- and rod-fishing; that it commenced on the 1st November—that is, the date when rod close time began; and that the portion of the net close time preceding that date is outside section 36. But the section deals not with part of the close time, but with the entire close time. A new close time cannot be constructed by amputating part of one. The introduction of a special short close

(1) Collection of Fishery Cases, Q. B., January 19, 1876.

time for angling by way of exception cannot abbreviate the general close time which is still in force, or take the latter out of the operation of section 36, which, if 26 & 27 Vict. c. 114 had not been enacted, would have admittedly applied to the present case.

It is said that the provision making the possession of salmon during the close season *primâ facie* evidence that the salmon was caught during the close season excludes this construction, as fish might be lawfully caught by rod during part of the net close season, and that fact, if proved, would be a defence. Assuming, but not deciding, that the provision might not apply to the portion of the general close season during which angling was permitted, I am of opinion that this does not make the section inapplicable to the general close season, when it is proved in fact, as here, that the fish was caught by net. If the decision below had depended on the application of the presumption, the case might have presented greater difficulty; but the finding as to the salmon having been netted was based on clear substantive evidence. The construction of the section adopted below, cutting off part of the general close period, making it begin on the 1st November, and then taking this new shortened period as the close period described in section 36, does violence to the language of the section, which is capable of the reasonable distributive interpretation that I adopt.

The defendant should have been convicted, and we so decide.

MADDEN, J., concurred.

KENNY, J.:—

The summons was brought under the 36th section of the Fisheries Act of 1842, which deals with two distinct offences, namely, the capture, during close time, of salmon or trout, and (so far as the present case is concerned) the exposure for sale of fish so caught. The close time for fishing with nets runs from the 20th August to the last day of February, while that for rod-fishing does not commence until the 1st November. The latter period was fixed by the Fisheries Act of 1863, sect. 23. The exposure for sale in respect of which the defendant was charged took place on the 10th October; that being a date when it was

K. B. Div. 1908. KING, Appellant; RUSSELL, Respondent. Kenny, J.

illegal to catch salmon with nets or to expose for sale salmon so caught, though it was lawful to capture salmon with rod and line, and expose such salmon for sale. The four salmon in question were proved to have been caught with *nets*. The Justices had no difficulty in arriving at that conclusion, and have so found. But they considered that the close time applicable to the case was that which was fixed in connexion with rod-fishing. By what process of reasoning they arrived at this determination, I find it difficult to appreciate. No doubt there was but the one close season in respect of all engines, including rod and line, up to the Act of 1863; but the fact of the close season for rod-fishing having been curtailed, did not affect the period during which net-fishing would be illegal; and it seems to me to be quite plain that, the "capture" having been pronounced to be illegal, the exposure for sale of the fish so illegally caught was also illegal.

Solicitor for the appellant: *John K. Currie.*
Solicitor for the respondent: *Joseph M. Kennedy.*

J. G. T.

K. B. Div. 1908. Oct. 30. Nov. 3. Appeal. Dec. 1, 2.

IN THE MATTER OF AN ARBITRATION BETWEEN DOUGLAS AND THE BELFAST CORPORATION (1).

Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *s.* 217—*Destruction of carcase as unfit for human food—Compensation—Arbitration—Failure to appoint arbitrator within prescribed period—Delivery of appointment to arbitrator—Sole arbitrator—Extension of time for award—Appearance under protest.*

In arbitration proceedings under section 217 of the Public Health (Ireland) Act, 1878, if the assent of an arbitrator be obtained prior to the execution of the document by which he is appointed, such assent is sufficient to make the appointment valid as from the date when the document is executed; and, provided the appointment be made within the period prescribed by sub-section 4, it is immaterial whether the document is delivered to the arbitrator before or after that period has elapsed. But, *semble*, the document by which the

(1) In the King's Bench Division, before ANDREWS and WRIGHT, JJ.

appointment is made must be delivered to the arbitrator before he enters on the evidence.

Where the scope of the arbitration is limited to the determination of the fact of damage and the amount of compensation, and does not include the question of the right to compensation, the appointment of an arbitrator will not be invalidated by reason of the fact that the document by which it was made contains a statement that the appointment is made under protest and without admission of any liability on the part of the person against whom compensation is to be assessed.

MOTION by the Belfast Corporation to set aside an award.

The arbitration proceedings in the matter arose out of the following circumstances:—

Upon April 13th, 1908, the carcase of a bullock, the property of Thomas Douglas, was condemned as unfit for human food by James A. Gordon, city veterinarian of the city of Belfast, the carcase being then at the city abattoir; and a certificate of unsoundness was, at the request of Thomas Douglas, given to him. No steps were taken by Thomas Douglas with regard to the destruction of the carcase in question: and on April 16th a message was sent to him to the effect that the carcase would be brought before the magistrates on the following morning for the purpose of obtaining an order for its destruction, unless in the meantime he signed a request for its destruction. On the day on which this message was sent, a Miss Jane Douglas called at the abattoir, stating that she had been sent to sign the necessary request, which she then signed in the following manner:—"Thomas Douglas, per J. Douglas." Pursuant to this request the Corporation officials caused the carcase to be destroyed.

It appeared that Thomas Douglas was in Dublin on the date when the request was signed by Miss J. Douglas; and on May 11th he wrote to Sir S. Black, the town clerk of Belfast, demanding compensation for the loss of the carcase, on the grounds that he (Thomas Douglas) was not in default, and that the action of the Corporation officials in the matter was illegal. The matter was referred to the Market Committee of the Belfast Corporation, who refused to recognize any liability in the matter.

On May 23rd Sir S. Black received from Thomas Douglas a notice of the appointment by Thomas Douglas of Robert N. Boyd,

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to act as arbitrator on behalf of Thomas Douglas to ascertain the amount of compensation payable to the said Thomas Douglas under ss. 216, 217, and 274 of the Public Health (Ireland) Act, 1878, for the destruction of the carcase in question. This notice, and also the document appointing Mr. R. N. Boyd, were dated May 22nd, and were both received by Sir S. Black on May 23rd. On May 30th Sir S. Black wrote on behalf of the Market Committee of the Belfast Corporation, stating that as they understood the amount of Thomas Douglas' claim to be under £20, they elected under sect. 276 of the Public Health (Ireland) Act, 1878, to have the question determined by a Court of Summary Jurisdiction.

On June 4th Thomas Douglas wrote to Sir S. Black, giving particulars of his claim, amounting to £21 5*s.*, and stating that he claimed in addition "compensation for loss of time, loss of trade, personal expenses, and costs."

On June 6th the Belfast Corporation, under its seal, appointed J. J. Ross, V.S., to act as arbitrator on their behalf "with reference to the fact of damages or amount of compensation" payable by them for the seizure and destruction of the carcase in question.

The appointment was as follows:—

"WHEREAS, on the 13th day of April, 1908, the carcase of a bullock was seized at the Belfast City Abattoir as diseased, unsound, unwholesome, and unfit for the food of man, under section 132 of the Public Health (Ireland) Act, 1878, and afterwards destroyed.

"And whereas, on the 22nd day of May, 1908, Thomas Douglas, who claimed to be the owner of the said carcase, appointed Robert N. Boyd arbitrator for him, to assess the amount of compensation payable to him, under sections 216, 217, and 274 of the said Act, on account of such seizure and destruction.

"And whereas, while denying all liability, we elected to have the said matter settled by a Court of Summary Jurisdiction, in pursuance of section 274 of the said Act, as, in our opinion, the claim did not exceed £20; but the applicant stated that his claim exceeded that amount.

"We, the Lord Mayor, Aldermen, and Citizens of the City of Belfast, by virtue of section 217 of the Public Health (Ireland) Act, 1878, hereby nominate, constitute, and appoint John James Ross, in the city of Belfast, Veterinary Surgeon, as arbitrator on our behalf with

reference to the fact of damage or amount of compensation incurred by or payable to the said Thomas Douglas on account of the seizure and destruction of the said carcase, as aforesaid.

"We make this appointment under protest, and without admission of any liability whatsoever, objecting that the case is not one to which the said Act applies; and if it is, that a Court of Summary Jurisdiction is the proper tribunal.

"Dated this 6th day of June, 1908."

[SEAL.]

This appointment, and the notice of its having been made, were, on the 6th January, delivered to Thomas Douglas personally. The notice contained a denial of liability on the part of the Corporation, and a statement that the appointment was made under protest, similar in terms to those contained in the appointment.

The circumstances under which the appointment of Mr. J. Ross was made were thus detailed in an affidavit of Sir S. Black:—"Upon June 6th I caused Mr. J. J. Ross, M.R.C.V.S., to be asked verbally whether he would be willing to act as arbitrator on behalf of the Corporation if appointed; and, upon his replying that he would act if appointed, his name was submitted to the Market Committee, and he was on the same day duly appointed . . ."

On June 9th the document appointing Mr. Ross as arbitrator was sent to him by Sir S. Black, and on the same day Mr. Ross wrote to Mr. Boyd a letter as follows:—

"MAY STREET, BELFAST,
"*10th June*, 1908.

"DEAR MR. BOYD,—It was only late yesterday evening that I became aware of the fact that I had been appointed as one of the arbitrators in the case of Douglas *v.* The Corporation. Now, it is just possible, as you mention, that we may be able to settle this affair ourselves, and I am quite sure you as well as myself will be actuated by the best intentions; yet, we are both meeting the public in our daily avocations, and in our own interests we ought to agree upon an umpire before commencing the duties. . . . I am of opinion it would be more desirable to select an umpire free from trade associations of any kind, and as some legal technicalities may arise, I would suggest the appointment of a member of the legal profession; and in such

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selection, for my part, I would favour the naming of someone not directly coming in contact with clients, such as a barrister. I am not personally acquainted with either of the gentlemen I would name, nor have I ever spoken to them, except from the witness-box. The names referred to are T. W. Brown, B.L., Rea's Buildings, Royal Avenue, or Geo. Hill Smith, Glenmona, Cregagh Road. The addresses as above are as I find them in the Belfast Directory. I mention these locals, as their fees, I am sure, would be less than bringing anyone, say, from Dublin. Hoping this suggestion will meet with your approval, and that we may be able to get the affair over as soon as possible,

"I remain, yours truly,

"J. J. Ross."

On June 13th Thomas Douglas sent to the Belfast Corporation a notice objecting to the appointment of Mr. J. J. Ross, upon grounds which may be summarized in the following manner :—(1) That the appointment was not made and perfected within the statutable time prescribed by section 217, sub-sections 2 and 4, of the Public Health (Ireland) Act, 1878. (2) That the appointment was bad in form, as it contained a denial of liability under the said Act. (3) That the arbitrator, Mr. Ross, was unfit to act in the matter by reason of "bias," being in the employment of the Belfast Corporation.

The facts upon which this third objection was based are not material for the purposes of this report; but, without admitting that they constituted a valid objection to Mr. Ross's capacity to act in the matter, Sir S. Black, on June 18, offered on behalf of the Belfast Corporation to revoke the appointment and to appoint another arbitrator within seven days, upon receiving a written consent to that effect from Thomas Douglas.

On June 23rd Thomas Douglas replied, refusing this offer, and stating that, as the appointment had not, in his opinion, been made in time, sect. 217, sub-sect. 4, of the Public Health (Ireland) Act, 1878, applied, and that Mr. R. N. Boyd was, therefore, entitled to act as sole arbitrator.

On June 24th Sir S. Black sent a notice to Messrs. Boyd and Ross, calling on them to appoint an umpire; and on July 6th Thomas Douglas wrote to Sir S. Black, stating that he had warned the arbitrators not to appoint an umpire, and repeating the reasons which he had already given for acting as he did.

No umpire was, in fact, appointed by the arbitrators; and on July 18th the Belfast Corporation received a notice for Mr. R. N. Boyd, dated July 17th, stating that he would sit and hear the reference upon the following Monday as sole arbitrator. The Corporation appeared before him under protest, objecting to his authority to act alone and repeating their objections as set forth in their appointment of Mr. Ross (*supra*, p. 33).

On June 13th Mr. Boyd, by instrument in writing under his hand, extended the time for making his award to July 21st; and on the latter date he made and published his award, by which he awarded £20 as compensation, and £24 as costs, to Thomas Douglas, and directed the Corporation to pay in addition £10 10*s*. as the arbitrator's fees and £10 as his costs.

On September 11th Thomas Douglas obtained in the King's Bench Division an order that the appointment of Mr. R. N. Boyd should be received and made a rule of Court; and also a conditional order confirming the award of Mr. R. N. Boyd unless cause to the contrary was shown within six days.

On September 25th the Belfast Corporation served notice of motion to discharge the order of September 11th, and to set aside the award.

R. F. Harrison, K.C., and *Overend*, for the Corporation of Belfast.

Ignatius J. O'Brien, K.C., and *W. J. Johnston*, for Mr. Douglas.

The arguments were in substance the same as in the Court of Appeal, *infra*, pp. 40–42.

Nov. 3.

ANDREWS, J., delivered the judgment of the Court:—

We have had sufficient opportunities of considering this application since it was opened, and we do not consider it necessary to defer our judgment. I shall now state our decision, and the grounds on which it is based.

We decide this application upon one ground only, and there-

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fore I shall not discuss the other questions which have been argued, and which may hereafter come up for decision.

The case arises under the Public Health (Ireland) Act, 1878; and the dispute between the parties originated in the following manner. The Sanitary Authority—namely, the Belfast Corporation—purporting to act under the provisions of the Public Health Act, through its officers, seized the carcase of a bullock, the property of Mr. Douglas, alleging that the carcase was diseased and unfit for human food. The carcase was condemned by the Corporation's inspector, and was subsequently destroyed by the Corporation's officials, apparently under the impression that the owner had consented to its destruction. The owner, however, denied the authority to act on his behalf of the person by whom the consent was given; and contended that he was entitled to compensation, inasmuch as he had suffered loss through the action of the Corporation, he himself not being, as he alleged, in default. He accordingly had resort to the provisions of the Public Health (Ireland) Act, 1878, in relation to the determination by arbitration of disputes as to compensation. The Corporation would have preferred to go before a Court of Summary Jurisdiction; but as the complainant's claim exceeded £20, this course could not be adopted. The contention of the complainant, and the course which he adopted, led to proceedings under the Act, and ultimately to the motion now before us.

Before considering the provisions of section 217 of the Public Health (Ireland) Act, 1878, which regulates arbitration thereunder, I wish to refer to the section (216) which immediately precedes it. That section enacts that :—

> "In case of dispute *as to the amount* of any compensation to be made under the provisions of this Act (except where the mode of determining the same is specially provided for), and in case of any matter which by this Act is authorized or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall appoint an arbitrator, to whom the matter shall be referred."

That section shows that the question to be referred to arbitration in a case like the present is a dispute relating, not to the title to, but to the amount of, compensation.

Believing himself to be entitled to enforce a claim for compensation under the Act, Mr. Douglas had recourse to the provisions of section 217, which enacts by sub-section 1 as follows:—

> "Every appointment of an arbitrator under this Act, when made on behalf of the Sanitary Authority, shall be under their common seal, and on behalf of any other party, under his hand, or if such party be a corporation aggregate, under their common seal."

So far as the appointment made by Mr. Douglas is concerned, it is not disputed that it was regular, and was followed in due course by a notice thereof given by him to the Corporation. The appointment made by the Corporation is also regular in form, but the question has been raised whether it was made within the prescribed time. It is not contended that it can have any effect if not made in time.

Sub-section 2 of section 217 is as follows:—

> "Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same."

There is no provision in this sub-section limiting the time within which the appointment should be delivered to the arbitrators; and the sub-section appears to be a provision for ensuring that the arbitrators should, before acting, be assured of their authority to act as a tribunal duly constituted under the statute. Sub-sect. 3 of the same section does not affect the case before us; and I now come to sub-section 4, upon the construction of which the question for our decision turns. This sub-section is as follows:—

> "If, for the space of fourteen days after any matter by this Act authorized or directed to be settled by arbitration has arisen, and notice in writing by one party who has duly appointed an arbitrator has been given to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fails to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by, and shall act on behalf of, both parties."

The notice prescribed by this sub-section was sent by Mr. Douglas to the Corporation, and was delivered on the 23rd of May.

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The Corporation had fourteen days from that date within which to appoint an arbitrator to act on their behalf, and their appointment of Mr. Ross was made on the 6th of June—the fourteenth day—but was not delivered to him until after that day. It is not disputed that the assent of the person appointed as arbitrator is necessary to give validity to the appointment. In the view which we take of this case, it is unnecessary for us to decide whether, in the case of an assent given after the execution of the appointment of an arbitrator, the date of the appointment should be deemed to be that on which the assent was given, or whether the assent should be deemed to relate back to the date of the appointment, so as to make it a valid appointment as from that date.

We are of opinion that the appointment of Mr. Ross by the Corporation on the 6th of June became a valid appointment at the very time at which it was made under the Corporate Seal, by reason of the assent to act which had previously been obtained from him on the morning of the same day; and that the fact that it was not delivered to him until afterwards is not material. His appointment on the 6th June having been valid and regular as regards time, he was entitled and authorized, in the absence of any other sustainable objection to his appointment, to act in an arbitration the subject of which was the ascertainment of the fact of damage and the amount of compensation payable to Mr. Douglas by the Corporation in respect thereof.

A second objection, however, has been made to the validity of Mr. Ross's appointment, based upon the form of the document by which it was made. It has been argued on behalf of Mr. Douglas that an appointment under the Act must be unconditional in its terms, and that Mr. Ross's appointment was not unconditional. The recital with which the appointment commences does not, in our opinion, in any way affect its validity; nor can any objection be urged against the operative part of the document. It is a precise and absolute appointment of Mr. Ross to act as arbitrator in determining the existing dispute. The effect of this part of the document was to give Mr. Ross authority to act as an arbitrator in determining the fact of damage and the amount of compensation to be awarded. The scope of the arbitration did not

include the question of the right to compensation. The arbitration was to ascertain whether damage had been sustained, and, if so, to fix the amount of the compensation which should be made for it. It is settled that in such a case a party may appear at the arbitration under protest and take part in the proceedings without thereby abandoning his right to dispute his liability for the damages complained of. That has been established by the cases of *Ringland* v. *Lowndes* (1) and *The Brierly Hill Local Board* v. *Pearsall* (2).

I now return to the concluding paragraph of the document appointing Mr. Ross arbitrator to act on behalf of the Corporation, which is as follows:—"We make this appointment under protest and without admission of any liability whatsoever, objecting that the case is not one to which the said Act [*i.e.* the Public Health (Ireland) Act, 1878] applies, and, if it is, that a Court of Summary Jurisdiction is the proper tribunal." The same objection was, in substance, made verbally on behalf of the Corporation at the arbitration, and protected them against being held to have admitted liability to pay compensation if awarded. The clause in question in the appointment is similar to the protest, and was intended merely to guard the right of the Corporation to dispute their liability, not to affect the arbitrator's right to act in determining the fact of damage and the amount to be awarded in respect of it, and the validity of his appointment is in no way affected thereby.

Mr. Douglas declined to accept Mr. Ross's appointment, objecting that it was late, and insisted upon a hearing before the arbitrator whom he had appointed; the Corporation, although they appeared at the hearing, objected to the authority of Mr. Douglas's nominee, Mr. Boyd, to act alone, notwithstanding which he proceeded with the arbitration and made the award, which has been impeached, as sole arbitrator; and as we have decided that Mr. Ross's appointment was valid, and that he was entitled and authorized to act as an arbitrator in the arbitration, it follows that the arbitration held by Mr. Boyd alone was invalid, and that his award cannot stand.

(1) 17 C. B. (N. S.) 514. (2) 9 App. Cas. 595.

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Counsel for Mr. Douglas, in answer to a question put by me, said that he thought that the validity of the award should be decided on the present application; and our order will in substance be that the cause shown against the conditional order to confirm the award will be allowed, and the conditional order discharged, and the award will be set aside, and the order whereby the appointment of Mr. Boyd was received and made a rule of Court will be also discharged. Then—as to the costs—the general rule is that costs should follow the event; and we see no reason to depart from it in the present case; and Mr. Douglas therefore must pay to the Corporation their costs of this application.

J. C. W.

Appeal. Dec. 1, 2.

Mr. Douglas appealed (1).

Ignatius J. O'Brien, K.C., and *W. J. Johnston*, for the appellant:—

The Sanitary Authority's powers as to the destruction of a carcase unfit for food arise under sect. 132 of the Public Health (Ireland) Act, 1878. Section 274 of the Act provides for compensation to be assessed by arbitration, except where the amount claimed does not exceed £20. Arbitrations are regulated by sects. 216–218, and it is under sect. 217 that one of the questions in the present case has arisen. We contend that the Belfast Corporation failed to make a valid appointment of a second arbitrator within fourteen days from the notice of Boyd's appointment, and, therefore Boyd became entitled to act as sole arbitrator. Under sect. 217, sub-sect. 2, the appointment is to be delivered to the arbitrators, and shall be deemed a submission to arbitration. That means that the instrument appointing each arbitrator should be delivered to him, and such delivery is essential to complete the appointment. Until it is delivered there is no appointment:

(1) In the Court of Appeal, before The Lord Chancellor, and Fitz-Gibbon and Holmes, L.JJ.

Yates v. *Mayor of Blackburn* (1), *per* Martin, B., at page 71, a decision under sect. 25 of the Lands Clauses Act, 1845, which contains language precisely similar to sect. 217, which we have to construe, except that by sect. 25 the party who has validly appointed an arbitrator may, on failure by the other side, appoint such arbitrator to act for both parties; and sub-sect. 4 of sect. 217 provides that on such failure he shall be deemed to be appointed by, and shall act on behalf of, both parties. This decision is referred to in the recognized text-books: Browne and Theobald on Railways (3rd ed.), 153; 1 Hudson on Compensation, 204. In *Tew* v. *Harris* (2) notification and delivery are placed in the same category, both being necessary to complete the appointment. The appointment must be complete so that it cannot be recalled. This is for the purpose of enabling the opposite party to consider whether he will acquiesce in the appointment: *Bradley* v. *London and North-Western Railway Co.* (3). Ross's letter to Boyd shows that he did not get the appointment within the fourteen days.

R. F. Harrison, K.C., and *Overend*, for the Belfast Corporation:—

This is an attempt by one party to appoint a sole arbitrator and enforce his award. He cannot do this unless there was a failure by the other side to appoint a second arbitrator for fourteen days after the notice of the appointment of the first arbitrator. "Appoint" is first used in section 216, and the words "appoint" and "appointment" run through both sections 216 and 217. The object of the delivery required by sub-section 2 was, that when the arbitrators come to hold the arbitration they shall have their appointments in their hands to satisfy the parties of their power to adjudicate, and to satisfy the umpire that they have power to appoint him. Sub-section 2 of sect. 217 is different from sect. 25 of the Lands Clauses Act, 1845. The appointments are to be delivered to the "arbitrators." They need not be delivered until two arbitrators are appointed. *Yates* v. *Mayor of Blackburn* (1) merely decided that the requirements of section 25 of the Lands Clauses Act were not complied with. The final sentence in the

(1) 6 H. & N. 61. (2) 11 Q. B. 7. (3) 5 Ex. 769.

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judgment of Martin, B., was not necessary for the decision of the case, and is extra-judicial. In *Bradley* v. *London & North-Western Railway Co.* (1), no appointment had been made, and it was held that notice of intention to appoint was not enough to satisfy section 25. It is not necessary to consider whether the appointment was irrevocable. The only question is, whether within the fourteen days the Corporation failed to appoint, *i.e.*, to make the appointment as contrasted with delivery.

As to appearing at the so-called arbitration, all the cases show that the party by appearing under protest does not waive his right to object to jurisdiction: *Davies* v. *Price* (2); *Ringland* v. *Lowndes* (3); *Brierly Hill Local Board* v. *Pearsall* (4).

O'Brien, K.C., in reply:—

The statement in the judgment of Martin, B., in *Yates* v. *Mayor of Blackburn* (5) as to the effect of non-delivery, was not a mere *obiter dictum.* He plainly considered that the appointment if delivered to the arbitrator before tender would have entitled the claimant to the costs of the proceedings. The arbitrator's authority does not arise until his appointment is delivered to him.

As to the uses of the word "arbitrators" in the plural, sub-section 2 must be read distributively. The meaning is that as each arbitrator is appointed the appointment is to be delivered to him. This is clearly shown by sub-section 3, which provides that when the appointment is once made, it shall not be revoked without consent. *Ringland* v. *Lowndes* (3) does not touch the present case (6).

(1) 5 Ex. 769.
(2) 34 L. J. Q. B. (N.S.) 8; 6 L. T. (N. S.) 713.
(3) 15 C. B. (N. S.) 173.
(4) 9 App. Cas. 595.
(5) 6 H. & N. 61.

(6) Counsel also argued (*a*) the question whether the extension of time for making the award was made in time, (*b*) whether the case was one for a Court of Summary Jurisdiction and not for arbitration; but as these were not dealt with in the judgments of the Court of Appeal, it is considered unnecessary to report the arguments upon them.

THE LORD CHANCELLOR:—

In this case we are all of opinion that the judgment of the King's Bench Division should be affirmed, on the grounds stated by Mr. Justice Andrews. The last point argued, as to whether the extension of time for making the award was in time, would be a more difficult question, upon which I express no opinion.

The appellant is seeking to enforce an award made on the 21st July, 1908, by Mr. R. N. Boyd, as sole arbitrator; and the question arises under certain sub-sections of section 217 of the Public Health (Ireland) Act, 1878. Douglas, who is a butcher, had in his possession on the 13th April the carcase of a bullock, which the inspector of the Sanitary Authority considered unfit for human food, and seized at the abattoir and destroyed. A Miss Jane Douglas, purporting to act for the appellant, consented in writing to its destruction at once; but her authority was repudiated by Douglas. He claimed compensation, and on the 22nd May appointed Boyd as his arbitrator in reference to the matter, and on the 23rd May gave notice of the appointment to the Sanitary Authority. On the 6th June the Corporation appointed Mr. James Ross as their arbitrator in reference to the dispute, and on the same day gave notice of the appointment to Douglas. It does not appear that Douglas had then delivered his appointment to Boyd. Douglas being of opinion that the Corporation had failed to appoint an arbitrator within the prescribed time, and that therefore Boyd was sole arbitrator, proceeded to obtain this award. Boyd, on the 13th June, extended the time for making the award until the 21st July, and on that day he made the award which Douglas is seeking to enforce. He gave £20 as compensation, £24 as Douglas' costs, and directed the Corporation to pay £10 10*s.* as his own fees, and £10 as his costs. I make no observation on the items allowed by this award. It is not material for our decision whether they were excessive or not. The Sanitary Authority appeared at the arbitration under protest, and they appointed Ross under protest. That, however, makes no difference, as was settled by the House of Lords in *The Brierly Hill Local Board* v. *Pearsall* (1). They also insisted that the claim

(1) 9 App. Cas. 595.

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was under £20, and should be disposed of by a Court of Summary Jurisdiction.

In the view I take of the case there is only one question—Did the Corporation fail to appoint an arbitrator within the time limited by the Act of 1878? It is on that failure that the other questions which have been argued would arise. It is sworn by Sir Samuel Black that Ross, having previously consented to act, was appointed by the Corporation under their common seal on the 6th June, and that notice of the appointment was given to Douglas on the same day. Boyd could not be deemed to be appointed by, or have power to act on behalf of, both parties, unless the Corporation failed to make the appointment within fourteen days from the 23rd May; and the only ground on which it is suggested that they failed to do so is that delivery of the instrument of appointment to the arbitrator was a necessary part of the appointment, and that this was not done until after the 6th June. Mr. O'Brien argued that point very vigorously. He relied on three cases. *Bradley* v. *London & North-Western Railway Co.* (1) does not decide that delivery to the arbitrator was necessary to make the appointment complete. There the only notice given was of an intention to appoint an arbitrator. Nor did *Tew* v. *Harris* (2) so decide. It was based on the fact that notice was not given of the appointment; and it follows inferentially that when notice is given the appointment is complete. *Tew* v. *Harris* (2) is therefore an authority supporting Mr. Justice Andrews' judgment. Here notice was given. *Yates* v. *Mayor, &c., of Blackburn* (3) is a more difficult case. The question there was whether a tender was made in time. It turned on the 25th section of the Lands Clauses Consolidation Act, 1845, and Baron Martin was dealing there with legislation which is by no means the same as the legislation we have to deal with. No doubt, Baron Martin used strong words at the end of his judgment. But they were not necessary for his decision. Even if he had decided that delivery was necessary, I would respectfully decline to apply that decision here. Here the question turns on sect. 217 of the Public Health Act, 1878. Every appointment of an arbi-

(1) 5 Ex. 769. (2) 11 Q. B. 7. (3) 6 H. & N. 61.

Appeal. 1908.

In re DOUGLAS AND BELFAST CORPORATION

The Lord Chancellor.

trator by a Sanitary Authority is to be made under their common seal (sub-sect. 1). Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same (sub-sect. 2). It was necessary, before entering on the arbitration, that the arbitrators should have their appointments delivered to them. Any other construction would be inconsistent with what follows, namely, "after the making of any such appointment" (the "making" there is what is referred to in sub-sect. 1), "the same shall not be revoked without the consent of both parties." But the most material subsection is (4). So far as regards that sub-section, what the Sanitary Authority has to do is to appoint an arbitrator after having received from the other party notice of the appointment of his arbitrator. If the party to whom notice in the first instance has been given fails to make an appointment within fourteen days, the arbitrator of the party giving the notice shall be deemed to be appointed by both parties. Notice runs through the whole of that sub-section. There was no object in making delivery an essential part of the appointment. As regards Douglas, in this case he knew that an arbitrator was appointed by the Sanitary Authority. He got notice of the appointment, and he might know nothing about delivery of the instrument of appointment until the arbitrators came to sit. Under these circumstances we think the judgment of Mr. Justice Andrews as to the construction of the 4th sub-section was completely correct, and that the appeal must be dismissed.

FITZ GIBBON, L.J.:—

I cannot forget how this case comes before the Court. It is an application on behalf of the appellant to enforce the award of a single arbitrator, on the ground that the Corporation has failed to appoint an arbitrator within the meaning of the Act, and that the arbitrator appointed by the opposite party appellant thereby became entitled to act as sole arbitrator, and must be deemed to have been appointed by both parties. What is "making an appointment" under the Irish Act? I think that executing the instrument which appoints as arbitrator a competent person who is able and willing to act "makes the appointment," and

Appeal. 1908.

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Fitz Gibbon, L.J.

the provision that notice of such appointment shall be given to the opposite party not only supports this construction, but on the notice being given, takes the cases out of the principle of Baron Martin's judgment in *Yates* v. *Mayor, &c., of Blackburn* (1), because, in my opinion, there can be no revocation after the notice. *Tew* v. *Harris* (2), is important, because though it only held that the notification of the appointment to the opposite side within the prescribed time was essential to the completion of the appointment, it is silent as to the delivery of it to the arbitrator. I am of opinion that the appointment might be made by the Corporation by executing the instrument on the last day, sending notice of it to the claimants on the same day, and at the same time sending the document to the arbitrator; and I cannot hold that the Corporation would have failed to make any appointment, and that the claimant's arbitrator would have become sole arbitrator, under the Act, if, by accident or otherwise, the Corporation's arbitrator failed to get the paper until the next day. The whole point is whether Ross's letter, written as arbitrator to his supposed colleague about the selection of an umpire, by saying that he was not aware of his appointment until the previous day conclusively proved that the Corporation had failed to make any appointment. In my opinion there are no grounds, in law or on the merits, for the appeal, and in any case I should hold the enforcement of the *ex parte* award to be so inequitable that it ought to be refused.

Holmes, L.J. :—

It is to be regretted that when Mr. Boyd, the arbitrator of Mr. Douglas, opened communications with Mr. Ross in reference to the arbitration, some ingenious lawyer fastened on the words of Mr. Ross's letter of the 10th June as enabling Mr. Douglas to have a one-sided arbitration. The Corporation, having ascertained that Mr. Ross would act as arbitrator if appointed, sealed his appointment and sent a copy of it to Mr. Douglas within the prescribed time. I am of opinion that the appointment was then complete, although the document did not reach Mr. Ross until two or three days later.

(1) 6 H. & N. 61. (2) 11 Q. B. 7.

I find nothing in the Act of 1878 requiring delivery to the arbitrator within the prescribed time. If the arbitrator has assented to act, if his appointment has been sealed, and notice given to the other party, there has been no failure to appoint.

The judgment of Baron Martin (1), on which appellant relies, was given on another statute, different in its provisions from the present; and I do not think that it ought to affect our decision. Having thus come to the same conclusion as the Divisional Court on the same grounds, it is unnecessary to deal with other matters referred to in the argument. There is, however, one point on which I may be permitted to express an opinion. The statute provides the mode in which an animal, coming within its terms, is to be slaughtered—that is under the order of a magistrate.

Part of the difficulty in this case arose from the provisions of the Act in this respect not having been followed. A local authority like the Belfast Corporation ought to strictly adhere to what is authorized by statute; and I am sure that it is only necessary to call attention to the matter to have it attended to for the future.

Solicitor for the appellant: *M'Kay.*

Solicitor for the Corporation of Belfast: *Sir Samuel Black.*

W. G.

(1) 6 H. & N. 61.

Appeal.
1908.
Nov. 9.

M'LAUGHLIN *v.* SWAN (1).

SAME *v.* BATES.

Parliamentary franchise—Power of Revision Court to amend—Evidence relevant to claim as stated, showing a different qualification—Successive occupation—48 & 49 *Vict. c.* 17, *s.* 4.

Where, in a claim or list, a voter's qualification is, without *mala fides* or anything to mislead, incorrectly stated, and evidence relevant to the qualification as originally described shows that he is entitled to the franchise under another qualification, the Revision Court may and ought to amend, under the Parliamentary Registration (Ireland) Act, 1885, section 4.

Accordingly, where the qualification of a householder was described as A from B, and it appeared that the voter occupied A during the whole of the qualifying period, the Court being of opinion that no one was misled or prejudiced, and that the misdescription was made *bona fide* :—

Held, that the Revision Court had power to amend, and that the householder was entitled to the franchise.

Gillespie's Case (Lawson's Notes of Cases, 1885–1893) followed.

Appeals by the objector from the decision of Sir Francis W. Brady, Bart., K.C., retaining the voters' names. As both cases raised the same question, they were argued together in the Court of Appeal.

Swan's Case.

"The name of Thomas Swan appeared as No. 8 on the Supplemental List of Householders, Form No. 12, for the unit of Gortgrannagh, and the description of the qualifying premises in the fifth column was 'Castletown from Castletown.' The said Thomas Swan was duly objected to by Patrick M'Laughlin on the ground that he had not occupied premises as a householder in Castletown in succession from other premises in Castletown during the qualifying period.

"The facts, which were established by the evidence in the case which was given before me on the 16th day of September,

(1) Before Lord O'Brien, L.C.J., and FitzGibbon and Holmes, LJJ.

1908, were as follows:—The said Thomas Swan had resided two years in one house in Castletown, and had not removed during the qualifying period. The said Thomas Swan gave evidence, and stated that he had resided in the same house for the past two years or thereabouts, and had not removed during that time. The requisition on which his name was returned to the Clerk of the Union by him or on his behalf was produced, and was found to correspond with the description of the qualifying premises on the List.

"It was submitted on behalf of the objector that the description of the qualifying premises was bad, and could not be amended. The solicitor for Thomas Swan argued that the words 'from Castletown' were superfluous and immaterial, and that if any amendment was necessary I had power to amend by striking out the said words.

"I accepted this view and would have struck out the words denoting succession, namely, 'from Castletown,' if I thought it necessary. I retained the name of the said Thomas Swan on the List."

BATES' CASE.

"The name of Samuel Bates appeared as No. 2 on the Supplemental List of Householders, Form No. 12, for the Unit Kiltyclogher, and the description of the qualifying premises was stated in the fifth column as 'Asylum, Cranny, from Mullaghmore.' The said Samuel Bates was duly objected to by Patrick M'Laughlin on the ground that he had not been a successive inhabitant occupier during the qualifying period.

"The facts which were established by the evidence in the case which was given before me on the 16th day of September, 1908, were as follows:—Samuel Bates is an attendant in the Omagh Asylum, and in that capacity has resided in the asylum for the past two years or thereabouts, and he occupied no dwelling-house in Mullaghmore during any part of the qualifying period. The voter himself was examined and stated that he has been about two years in the asylum as attendant, and occupies rooms and sleeps there, and that it is about two years since he ceased to reside in Mullaghmore.

Appeal. 1908. M'LAUGHLIN v. SWAN.

"It was submitted on behalf of the objector that the description of the qualifying premises was bad, and could not be amended by striking out the words 'from Mullaghmore.' The solicitor for Samuel Bates argued that the words 'from Mullaghmore' were superfluous and immaterial, and that if it was necessary to amend I had power to do so by striking out those words.

"I accepted this view and amended the description of the qualifying premises accordingly, and retained the name of the said Samuel Bates."

Ignatius J. O'Brien, K.C., and *Muldoon*, for the appellant :—

The description in the List in each of these cases, was of a successive occupation. Succession was an essential element of the qualification as described, and if that description was erroneous it would not be amended at the Revision Sessions so as to create a wholly different qualification, even though the true qualification, if it had been originally described properly, might have entitled the person to the franchise. A mistake of this kind cannot be amended, for the amendment would substitute a qualification totally different from that appearing in the List: *M'Combe* v. *Buchanan* (1); *Foskett* v. *Kaufman* (2). The amendment, if it can be made at all, must be brought within sect. 4 of the Parliamentary Registration (Ireland) Act, 1885 (48 & 49 Vict. c. 17), and the statutory power to amend does not apply where the effect of the amendment would be to admit the voter under a qualification in its essence different from that which was in the first instance claimed or described: *Cullen* v. *Patterson* (3)—one of the earliest cases on this subject. *Wilson* v. *Buchanan* (4) is an authority to the same effect. All the previous cases were cited. *Gillespie's Case* (5) has always been disapproved of. [HOLMES, L.J., referred to *Quinn* v. *Buchanan* (6).] *Hurcum* v. *Hilleary* (7); *Soutter* v. *Roderick* (8).

(1) Lawson's Notes of Cases (1894–1900), 42.
(2) 16 Q. B. D. 279.
(3) 18 L. R. Ir. 274.
(4) 20 L. R. Ir. 213.
(5) Lawson's Notes of Cases (1885–1893), 327.
(6) *Ibid.* 309.
(7) [1894] 1 Q. B. 579.
(8) [1896] 1 Q. B. 91.

There was no appearance for the voters.

LORD O'BRIEN, L.C.J. :—

We have considered these cases, in both of which the same question arises. *Gillespie's Case* (1) was decided by this Court, and no subsequent decision has purported to overrule it. No doubt it has been criticised, but there it is. I myself consider that *Gillespie's Case* (1) was satisfactory, because it furthered the power of amendment. I think it would be a perfect scandal in the administration of the law if a man who has a right to vote should through a misdescription such as this be deprived of the franchise. *Gillespie's Case* (1) decided that if an objection is taken to a name appearing on the List, and it appears in the investigation of the voter's claim to be retained that he was entitled to another franchise, the matter may be amended. But there is this condition that the evidence must be relevant to the claim as originally stated in the List. I referred to that in *M'Combe* v. *Buchanan* (2).

Was the evidence here relevant to the qualification as stated? Dealing with it as a succession claim, suppose a man comes forward to make his claim, would it not be relevant to ask him : Did you occupy a house at a certain place, and how long were you there? but then the whole question would arise. He answers : I occupied the place for a whole year. That would be relevant to the first claim.

I am prepared to say that what the Revising Judge did was right in principle and supported by authority. I repeat that I am satisfied with *Gillespie's Case* (1), because I think it worked out justice. The broader the power of amendment is the better, if there is no *mala fides*, and no one is prejudiced. No one is prejudiced here.

FITZ GIBBON, L.J. :—

The first case will be amended by striking out the words "from Castletown," and the second by striking out the words "from Mullaghmore." I am glad that the Court has come to the

(1) Lawson's Notes of Cases (1885–1893), 327.
(2) Lawson's Notes of Cases (1894–1900), 42.

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conclusion that this can be done, and I hold that the evidence which was given, and which showed that the voter occupied the first-mentioned premises during the whole qualifying period, was not irrelevant. When given it entitled him to the franchise. Mr. O'Brien's contention was that he could not get that franchise unless he went on to prove that he had ceased to occupy those premises, and had gone into occupation of other premises before the end of the qualifying period. There was nothing misleading, and *Gillespie's Case* (1) applies. In *Quinn* v. *Buchanan* (2) it was held that where a succession claim described the claimant as having occupied A, B, and C in succession, and the evidence showed that he never had occupied C, but had occupied A and B for the whole year, the Revising Barrister had power to amend by striking out C. Without trying to reconcile *Quinn's* (2) and *Gillespie's Cases* (1) with *M'Combe* v. *Buchanan* (3), I think that the principle of *Gillespie's Case* (1) was correct, and that this case comes within it.

Holmes, L.J.:—

Gillespie's Case (1) was decided more than twenty years ago, and in the interval I doubt if any case has been more frequently mentioned to the Court; and on each occasion when it was mentioned, the members of the Court have stated that they were perfectly satisfied with the decision. Coming to this case it is impossible to hold, having regard to *Gillespie's Case* (1), that the amendment could not be made, and that the claimant is not entitled to the franchise. I quite admit that it is difficult to reconcile *M'Combe's Case* (3) with *Gillespie's Case* (1). It is suggested that they can be reconciled on the ground that in *M'Combe's Case* (3) the evidence was not relevant to the claim as stated in the list; but here the evidence was relevant to the claim as made.

Solicitor for the appellant: *F. G. O'Conner.*

W. G.

(1) Lawson's Notes of Cases (1885–1893), 327. (2) *Ibid.* 309.
(3) Lawson's Notes of Cases (1894–1900), 42.

LYNCH *v.* HARPER (1).

Appeal.
1908.
Nov. 9, 10.

Local Registration of Title (Ireland) Act, 1891—*Devolution of title from testate registered owner—Proof of will—Evidence—Parliamentary franchise—£5 freeholder*—13 & 14 *Vict. c.* 69, *s.* 2.

On the death of an owner of land registered under the Local Registration of Title (Ireland) Act, 1891, the devolution of his estate in the lands must be proved in accordance with the provisions of the Act, and probate or letters of administration must be produced. Proof of his will by the witnesses, as in case of real estate, is inadmissible.

Where A and B claimed the franchise as £5 freeholders, under the devise in a will of a registered owner:—

Held, that the Revising Barrister was right in rejecting evidence by the attesting witnesses of the due execution of the will.

APPEAL by Hugh and Charles Lynch from the decision of Mr. McGonigal, Assistant Revising Barrister for North Tyrone, striking their names out of the claimants' list of the Registration Unit of Maghernageeragh, as £5 joint rated freeholders in succession to their father, now deceased. The names were duly objected to. The necessary evidence of value was given. The father of the claimants had purchased the qualifying lands under the Land Purchase Acts, and was at the time of his death registered owner thereof under the Local Registration of Title Act, 1891. He was alleged to have made a will, which had not been proved in the King's Bench Division (Probate). The claimants called one of the attesting witnesses, whose evidence, if admissible, would have been sufficient to prove its due execution. The objector objected to the reception of this evidence. The Assistant Revising Barrister rejected this evidence, holding that, under section 84 of the Act, no evidence of the contents of the will was admissible until a personal representative of the testator was raised.

(1) Before LORD O'BRIEN, L.C.J., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1908.

LYNCH v. HARPER.

Ignatius J. O'Brien, K.C., and *Dougherty*, for the appellants:—

Section 84 of the Local Registration of Title Act does not make the land personalty, and it has no application to a case like the present, where a person is not seeking to prove his title to the land, but is merely claiming the franchise, for which purpose lawful occupation is sufficient; until the will is proved, the heir-at-law holds the estate in trust for the devisees. Even a will of personalty before probate confers certain rights: *Tevlin* v. *Gilsenan*(1). Occupation without title, *e.g.* under an instrument void at law, may confer the franchise: *Glenn* v. *Brennan* (2). Upon the purchase under the Land Law (Ireland) Act, 1896, the land was vested in the purchaser in fee-simple, sections 31, 32. Clear occupation as tenant, though not having any title as tenant (*Fogarty* v. *Shanahan* (3)), is sufficient for the franchise: *Roulston* v. *Kerlin* (4).

Though the land devolves as personalty, it remains real estate.

Babington, for the objector (respondent):—

The claim was as joint rated £5 freeholders under the Representation of the People Act, 1850, section 2. The cases relied on by the claimants are decisions under section 3 of the Act of 1867. It was necessary for the claimants to prove that they were seised in fee, and the question is whether the proof offered of their title was sufficient. They are claiming a special franchise depending on ownership.

[Counsel referred to the Local Registration of Title (Ireland) Act, sections 84, 85, 86, 87.]

O'Brien, K.C., in reply:—

As long as there is possession, there is an inchoate title. Possession is evidence of seisin in fee: Taylor on Evidence, 10th edition (1906), sect. 123. Section 84 only applies when a personal representative is raised. The equitable estate is in the devisees. If the objector's contention be sustained, supposing litigation

(1) [1902] 1 I. R. 214.
(2) 29 Ir. L. T. R. 79.
(3) [1896] 2 I. R. 273.
(4) [1908] 2 I. R. 335.

about the will took place, the franchise might remain in abeyance for years: *Torish* v. *Orr and Smith* (1).

LORD O'BRIEN, L.C.J.:—

We have considered this case, having regard to the provisions of the Local Registration of Title Act. I do not think the way I suggested of arguing the case, that is, looking at the claimants as persons in possession, and dealing with possession as evidence of seisin in fee, is open on the case as stated. The point stated for our determination is the construction of sect. 84 of the Local Registration of Title Act. Now, in my opinion, the will cannot be looked at at all. The claimants sought to prove the execution of the will by witnesses. I do not think the will can be looked at, except in the hands of the personal representative—that is to say, until probate has been taken out. It is not, in my opinion, necessary to go beyond the first clause of sect. 84. It provides, "where any such land is vested in any person," &c., "it shall, on his death, *notwithstanding any testamentary disposition*, devolve to and become vested in the personal representative, as if it were a chattel real vesting in him or them." It is a condition necessary to the ascertaining who the personal representative is, that probate should be taken out or administration, with the will annexed, granted. The title devolves through the personal representative. Here we are shut out from the will, as there is no probate or administration with the will annexed. It is not necessary, as I said, to refer to any part of the Act except sub-sect. 1 of sect. 84; but I think, however, that the 5th sub-section of sect. 84 entirely bears out the view I have taken. It shows that the devolution in the legal interest is through the executor or administrator, as the case may be. It provides "that probate or administration may be granted of such land only, although there is no personal estate."

FITZGIBBON, L.J.:—

The question before us is conversant only with the evidence admissible to prove the devolution of title of freehold registered land. Can the devolution of title to a freehold, on the death of

(1) [1894] 2 I. R. 381.

Appeal. 1908.

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the registered owner, be proved, when there is no personal representative ?

The Act 54 & 55 Vict. c. 66, sect. 84 (1), expressly enacts that "on the death of the registered owner of freehold registered land, it shall, on his death, *notwithstanding any testamentary disposition*, devolve to and become vested in his personal representative . . . as if it were a chattel real." There may be no personal representative; and in the case of intestacy there can be none until probate or administration is taken out. In the case of an owner of realty only, *e.g.*, of a registered owner of freehold land who had no personal estate, if he devised his realty without appointing an executor, there could not have been—or, at least, there need not have been—any probate or administration under the old law. Whether intentionally or not, the statute, by vesting the freehold in the personal representative as if it were a chattel real, necessitates the raising of such a representative "notwithstanding any testamentary disposition," and as the devolution of title to a chattel real could not be proved except by production of probate or letters of administration, and could not be shown by proving the original will *per testes*, I hold that the effect of the Local Registration of Title Act is to make probate essential to the proof of the devolution of a registered freehold. In my opinion, no other construction can give effect to section 84, though this makes the taking out of probate, or of letters of administration, necessary in some cases in which, before the Act, it would not only have been unnecessary but might have been impossible.

HOLMES, L.J. :—

I concur. The Revising Barrister took the view that the right to vote depended on the claimants showing title to the farm in their possession. I take the same view. It was shown before the Revising Barrister that the lands had been purchased by a registered owner, that he died and made a will. If that will could have been proved before the Revising Barrister, he would have held the claimants entitled to the franchise ; so the whole case turned on the will. The way it was proposed to prove the will was by one of the attesting witnesses.

It is said that the effect of the Local Registration of Title Act is to place registered land of this kind in the same position as regards devolution under a will as chattels real; and very elaborate provisions are found in the Act showing that this was the intention of the legislation. Section 86 (2) is a remarkable provision that, before probate or letters of administration are taken out, the same rules of law apply to such land as are applicable to chattels real. Before the passing of the Act chattels real on the death of the owner would vest in his executor, if there was an executor; and if there were no executor, would vest in the Judge of the Court of Probate. Section 84 (5) is of great importance. Lord Justice Fitz Gibbon has called attention to the fact that the ordinary law is that on the death of a person seised of real estate alone letters of administration cannot be obtained unless he has also some personal estate. Sub-section (5) is an express provision that administration may be obtained under such circumstances.

All these things show me that so far as regards deducing title it must be done in the same way as in the case of chattels real; and the necessary evidence could not be given in this case by reason of the fact that no probate or letters of administration had been obtained.

Solicitor for the appellant: *F. G. O'Connor.*
Solicitor for the respondent: *Thomas Elliott.*

W. G.

K. B. Div.
1908.

Nov. 12, 13, 23.

LYLE *v.* SMITH (1).

Landlord and tenant—Lease—Covenant by lessee to contribute to repair of sea-wall—Liability of assignee of lessee—Covenant running with the land—Agreement incident to tenancy—Landlord and Tenant (Ireland) Act, 1860 (23 & 24 *Vict. c.* 154), *s.* 12.

A lease of lands near the sea contained a covenant by the lessee, that if it became necessary to rebuild or repair a certain sea-wall the lessee, his executors, administrators, or assigns would contribute a certain proportion of the expenses incurred. The sea-wall was not parcel of the demised premises, but lay between them and the sea, and was necessary to protect the subject-matter of the demise from encroachment by the sea, and ultimate destruction:

Held, that the covenant ran with the land, and bound an assignee of the lessee.

Dewar v. *Goodman* ([1908] 1 K. B. 94; W.N., 1908, p. 250) distinguished.

Held, also, by Lord O'Brien, L.C.J., and Gibson and Kenny, JJ., that, even if the covenant did not run with the land in the strict sense, the effect of section 12 of the Landlord and Tenant (Ireland) Act, 1860, was to make the assignee liable.

Case Stated by Wright, J., on the hearing of a civil bill appeal. The case set out as follows:—

"1. This was an appeal from a decree of the County Court Judge of the county of Down granting a decree on a civil bill brought by the plaintiff against the defendant to recover a sum of £20 6*s.* 7*d.*, being the amount of the defendant's proportionate part of the cost and expense incurred by the plaintiff in rebuilding and repairing the sea-wall at Ballyholme, in the county of Down, and for which the plaintiff alleges the defendant is liable under a covenant in an indenture of lease dated 26th day of January, 1901. The civil bill and decree are annexed hereto.

"2. By this said lease, the plaintiff demised to William Lynass certain premises" (now known as No. Bay View Terrace, and identified as those marked I. Smith on the map herewith,

(1) Before Lord O'Brien, L.C.J., and Gibson, Madden, and Kenny, JJ.

and surrounded thereon by a green line, and which are situate on the south side of a road which, in the lease, is erroneously described as a county road) "for a term of 999 years from 1st May, 1901, in consideration of the yearly rent and covenants therein contained," and (*inter alia*) the following covenant:—"And the said lessee hereby covenants with the lessor, his heirs and assigns, and also, as a separate covenant with other the reversioner or reversioners, that when and so often as it shall become necessary during the continuance of this demise to rebuild or repair the sea-wall and embankment along the Ballyholme Bay, he, the lessee, his executors, administrators, or assigns, will contribute and pay his proportionate part of the cost and expenses incurred in such rebuilding or repairing, such proportionate part being calculated in the following manner, that is to say—the lessor paying one half of the entire cost of such rebuilding or repairing, and the lessee paying his share of the other half, such share being in proportion to his frontage as such frontage shall be to the frontages of the other tenants of the lessor liable to contribute to the rebuilding of the said sea-wall and embankment."

"3. The counterpart lease herewith, with map thereon, is admitted, and it is also admitted that prior to November, 1905, the lessee's interest under the lease became vested in the defendant, who paid the rent to the plaintiff and remained assignee until after the service of the present civil bill.

"4. The map herewith showing sections 'X' and 'Y' and plan of the bay and coast-line at Ballyholme, and the further section 'Z' (signed J. E. Croasdaile, M.I.C.E.), were made by survey to scale, and are to be considered as incorporated in this case, and are admitted. Ballyholme Bay faces north, and prior to the erection of the sea-wall was subject to encroachment by the sea. Towards the horns of the bay the coast is rocky; in the centre it is composed of light, sandy soil, liable to erosion, resulting in encroachment by the sea on the coast-line. A number of villas face the bay; each has a strip of garden in front running down to the road. On the sea (or northern) side of the road is a grass slope or embankment, at the foot of which is the sea-wall. This wall is about 540 yards long, running from Folly Bridge on the west to within a few yards of the stream shown on the east

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side of the plan. The plaintiff and his predecessors owned the entire lands fronting the bay, including the site of the said sea-wall. In 1884 the tenant for life, Edward A. Lyle, erected the sea-wall. All the lands shown on the map are now within the Urban District of Bangor, but the eastern portion of the road fronting Bay View Terrace is not a county road.

"5. It was further proved that a storm occurred on the 26th November, 1905, causing the breaches in the sea-wall shown (coloured pink) at A and B on the plan. The breach at A was so large as to endanger the roadway at that point. These breaches were repaired by the plaintiff at a cost of £242. The whole of the wall and the wall as a whole is necessary for the protection of the coast. If a breach remained unrepaired, the sea would scour behind the remainder, and eventually the entire wall would be swept away. Ultimately the sea would undermine and destroy the roadway and villas beyond. At 'Y' on the map the wall is 26 feet distant from the road, the road is 25 feet wide, and the centre of the road is 20 to 62 feet above the average high water of spring tides. At 'Z' the wall is 28 feet from the road, the road is 23 to 25 feet wide, and the centre thereof 22 to 53 feet above the said high-water mark; and at 'X' the wall is 39 feet from the road, the road is 31 feet wide, and the centre thereof 23 to 37 feet above said high-water mark. The shortest distance from the defendant's premises to the breach at A on the map along the line L M is 60 feet. At ordinary high tides the sea comes to the toe of the wall. The measurements in the lease do not include any portion of the roadway or land on the sea side thereof.

"6. Covenants analogous to that in the defendant's lease have been inserted in all new leases granted by the plaintiff since 1896 (other than renewals) to tenants of premises facing the bay. There are now seven tenants (including the defendant) whose leases contain such covenants. Their combined frontage is 184 feet 6 inches. The defendant's frontage is 31 feet. Dividing a moiety of £242, viz., £121, among these seven proportionately to their frontage, the defendant's proportion is £20 6*s.* 7*d.* There are other leases of premises which the said wall was built to protect which do not contain covenants similar to the covenants referred to in paragraph 2 hereof.

"7. The plaintiff contends that the defendant is bound by the covenant which, he alleges, runs with the land, and also that the reservation of the contribution towards the repair of the wall is part of the consideration for the demise and a term in the contract of tenancy. The defendant argues that the covenant does not run with the land or bind her as assignee, and, also, that the covenant is unmeaning, and, therefore, cannot be enforced. The question for the Court is, whether the defendant is bound under the terms of the lease to contribute towards the repair and maintenance of the sea-wall.

"8. If she is bound to contribute the amount, such contribution will be £20 6*s.* 7*d.*"

James Andrews (with him *Harrison, K.C.*), for the defendant:—

The sea-wall with which the covenant sued on is conversant forms no part of the demised premises; they do not even abut on it. The covenant is merely collateral, and does not run with the land. It does not touch or concern the thing demised, and therefore does not bind the assignee, even though named: *Spencer's Case*, 2nd resolution (1); *Gower* v. *Postmaster-General* (2). In order to run with the land, the covenant must touch the thing demised itself, and not merely the beneficial occupation of the thing: *Dewar* v. *Goodman* (3), *Thomas* v. *Hayward* (4). A covenant to do repairs to a wall not on the demised premises would not run with the lands, but even if it would, that is not the present case. The covenant here is merely to contribute a sum towards repair in the event of the lessor executing repairs, the landlord being under no obligation to execute them, and the tenant having no power to enter on the wall for the purpose of himself executing them. The only way in which a liability to pay such contribution could be made to bind the assignee would be, as pointed out by Kay, J., in *Gower* v. *Postmaster-General* (2), to reserve it as part of the rent.

(1) 1 Sm. L. C. (11th ed.), p. 55.
(2) 57 L. T. (N. S.) 527.
(3) [1908] 2 K. B. 94. Since affirmed, H. L.: see W. N., 1908, p. 250.
(4) L. R. 4 Ex. 311.

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Overend and *Bates*, *K.C.*, for the plaintiff:—

We submit that the defendant is liable on three grounds:—

1. The contribution is in the nature of rent, and is recoverable from the assignee of the lessee as part of the rent reserved: *Vyvyan* v. *Arthur* (1).

2. The covenant is one which runs with the land. It most clearly touches and concerns the thing demised, since it is necessary to preserve the subject-matter of the demise from destruction. It tends to the support and maintenance of the thing demised—it affects its nature, quality, and value, and the mode of its enjoyment, and therefore runs with the land, and binds the assignee: *Vernon* v. *Smith* (2), *per* Holroyd, J. (p. 7); *Mayor of Congleton* v. *Pattison* (3), *per* Lord Ellenborough, C.J. (p. 135); *Athol* v. *Midland Great Western Railway Co.* (4); *Jordan* v. *Wilson* (5); *Morland* v. *Cook* (6); *Sampson* v. *Easterby* (7). The fact that the covenant is to contribute towards the expense of the repair, and not directly to execute the repair, is immaterial: *Vernon* v. *Smith* (2). If the landlord had not executed the necessary repairs, the tenant might have entered on the wall and executed them himself: *Morland* v. *Cook* (6) at p. 261. *Dewar* v. *Goodman* (8) is distinguishable; the covenant there related not to the thing demised itself, but only to the title to the thing demised.

3. Even assuming that the covenant does not run with the land in the strict sense, the effect of section 12 of the Landlord and Tenant (Ireland) Act, 1860, is to render the assignee liable. That section is not confined to covenants running with the land, but extends to all terms in the lease which are incident to the contract of tenancy: *Borrowes* v. *Delany* (9), *per* Andrews, J., p. 517. Section 3 of the same Act bases the relation of landlord and tenant on contract and not on tenure, and makes a reversion unnecessary for the relationship, therefore the same considerations do not apply to section 12 of the Act of 1860 as have been applied to the statute of 32 Hen. 8, c. 34, in *Spencer's Case* (10), and subse-

(1) 1 B. & C. 410.
(2) 5 B. & Ald. 1.
(3) 10 East, 130.
(4) I. R. 3 C. L. 333.
(5) 4 B. & Ald. 266.
(6) L. R. 6 Eq. 252.
(7) 9 B. & C. 505.
(8) [1908] 1 K. B. 94.
(9) 24 L. R. Ir. 503.
(10) 1 Sm. L. C. (11th ed.), p. 55.

quent cases. The liability of the assignee now depends on privity of contract, and not privity of estate. [They also referred to 10 Car. 1, sess. 2, c. 4 (Ir.); 11 Anne, c. 2, s. 6 (Ir.); *Grogan* v. *Morgan* (1); *Earl of Egremont* v. *Keene* (2).]

Harrison, K.C., in reply:—

If the burden of the covenant runs with the land, so as to bind the assignee of the lessee, the benefit must also run with the reversion. But suppose the lessor assigned his reversion in the premises comprised in the lease, retaining the sea-wall, and he executes repairs to the sea-wall, who is to sue for the contribution? The lessor cannot, since he has parted with his reversion. The assignee of the lessor cannot, since he has spent nothing on the wall. A covenant, in order to run with the land, must touch or concern the thing demised directly and not indirectly; nearly all the cases cited for the plaintiff deal with the putting or bringing of something on the land, or its preservation when put there. In *Sampson* v. *Easterby* (3) the lessee had an interest in, and a right to enter, the other lands of the lessor for the purpose of building the smelting mill and using it: see *per* Buckley, L.J., in *Dewar* v. *Goodman* (p. 106) (4). There is no instance of a covenant to pay money having been held to run with the land except when reserved as rent. [He also referred to *Woodall* v. *Clifton* (5).]

The liability of the assignee is not extended by section 12 of the Landlord and Tenant (Ireland) Act, 1860. The words of that section are not more comprehensive than those of 32 Hen. 8, c. 34, the operation of which was held in *Spencer's Case* (6) to be confined to covenants running with the land. Section 12 of the Act of 1860 is merely a re-enactment of the statutes of 10 Car. 1, sess. 2, c. 4 (Ir.), and 11 Anne, c. 2, s. 6, with an extension to contracts of tenancy not under seal. If the construction sought to be put on section 12 is correct, there would have been no necessity for section 11.

Cur. adv. vult.

(1) Alc. & Nap. 366.
(2) 2 Jo. 307.
(3) 9 B. & C. 505.
(4) [1908] 1 K. B. 94.
(5) [1905] 2 Ch. 257.
(6) 1 Sm. L. C. (11th ed.), p. 55.

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LORD O'BRIEN, L.C.J.:—

This case brings up again a controversy which has existed for some centuries in our law, namely when, does a covenant run with the land? *Spencer's Case* (1), however reminiscent of an earlier period, most certainly does not renew our youth. The learning connected with it tells us of those subtle distinctions which in other days delighted the sages of the law, but which, perhaps, did not reflect much credit on the law itself. The facts which give rise to the controversy before us are set forth in the case stated for our determination by my brother Wright. The case stated has been so frequently read that it is not requisite to read it again. The lease to which it refers, and the lessee's interest in which is now vested in the defendant as assignee, contains the covenant upon which the controversy depends. It runs as follows: [His Lordship read the covenant.] The sea-wall which is referred to is not on any part of the demised premises, but is essential to the protection and preservation of the demised premises. Mr. Justice Wright, who tried the case, states:—"It was further proved that a storm occurred on 26th November, 1905, causing the breaches in the sea-wall shown (coloured pink) at A and B on the plan. The breach at A was so large as to endanger the roadway at that point. These breaches were repaired by the plaintiff at a cost of £242. The whole of the wall and the wall as a whole is necessary for the protection of the coast. If a breach remained unrepaired, the sea would scour behind the remainder, and eventually the entire wall would be swept away. Ultimately the sea would undermine and destroy the roadway and villas beyond." It is further found that the defendant's proportion, if she is bound to contribute, would be £20 6*s.* 7*d.*

The question for our determination is, Is the defendant in fact bound to contribute towards the repair and maintenance of the wall? No question has been argued as to amount, if she is bound to contribute at all. I am of opinion that the defendant, who is assignee of the lessee, is bound to contribute on two grounds: 1st, that the obligation to contribute is not a mere collateral agreement, that it is

(1) 1 Sm. L. C. (11th ed.), p. 55.

a covenant which runs with the land; 2nd, on the point secondly argued, that if the agreement or obligation is not one that can be held, strictly speaking, to run with the land, it is at least a covenant incident to and relating to the tenancy, to the subject-matter demised, and being so binds the assignee under the provisions of the 12th section of the Landlord and Tenant (Ireland) Act of 1860.

Firstly, then, does the covenant in question run with the land, and bind an assignee? The word "assigns" is used in the covenant, and what is provided for is for the benefit, protection, and indeed I might say for the preservation of the subject-matter demised during the continuance of the tenancy. Now it is well settled that a covenant to do something on part of the land—the subject-matter demised—runs with the land, though assigns are not specifically named, and a covenant to do something which is intended to become parcel of the land runs with the land if the word "assigns" is used. But the cases have gone further. It has been held that though the thing to be done is not upon parcel, nor intended to become parcel, of the subject-matter demised, yet if the thing to be done is clearly for the benefit, support, and maintenance of the subject-matter demised, the obligation to do it runs with the land: see the case of *Easterby* v. *Sampson* (1). There Alexander, C.B., is reported to have said (p. 652):—"*Spencer's Case* (2) lays down the rule, that if the lessee covenant for him and his assigns to do anything on the land demised, it will bind the assignee, though the covenant should extend to a thing to be newly made. And in *The Mayor of Congleton* v. *Pattison* (3) Lord Ellenborough says:—'A covenant in which the assignee is specifically named, though it were for a thing not *in esse* at the time, yet being specifically named, it would bind him if it affected the nature, quality, or value of the thing demised, independently of collateral circumstance; or if it affected the mode of enjoying it.' That is the rule to be extracted from *Spencer's Case* (2) and from all which have followed it." And the Chief Baron added later in his judgment that the covenant to build a smelting mill, though it was not to be built on the land demised, yet ran with the land

(1) 6 Bing. 644. (2) 1 Sm. L. C. (11th ed.), p. 55. (3) 10 East, 130.

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because it was plainly connected with the mines which were demised. See also *Vyvyan* v. *Arthur* (1), and *Athol* v. *Midland Great Western Railway* (2).

A covenant to repair a sea-wall which so closely affected the quality, value, identity, and even the existence of the subject-matter demised would plainly run with the land; but the question here which was so much pressed by Mr. Harrison in his able argument is more difficult—much more difficult—it is this: Is the obligation created by the deed to contribute a proportionate sum an obligation which runs with the land? It was contemplated that the lessor's was to be the hand that was to do the entire work—the whole work necessary for the repair of the sea-wall throughout its entire length. Does the obligation on the part of the lessee to pay to the lessor a proportionate sum of this entire liability amount to an obligation running with the land? Certainly there is no case precisely in point; but I think that, having regard to the object contemplated and provided for, the obligation comes within the class of obligations which run with land. It most intimately touches and concerns the land. A sea-wall is obviously necessary for the protection, indeed for the preservation, of the subject-matter demised. It is manifestly for the interest of the lessee or assignee—for the interest of the person for the time being in possession as lessee or assignee—that the sea-wall should be repaired; and though the instrument of demise contemplates that, in the first instance at least, the hand to make the repair is the hand of the lessor, yet he works for the common benefit of himself and the lessee in a matter that touches and concerns the land, and he may be regarded as an agent *pro tanto* for the lessee, that is, an agent to expend in repair, and to do so much repair as may be covered by a contributive amount, ascertainable by the prescribed method and proportion. I think the obligation to pay the prescribed amount was, in its substance and essence, an obligation that ran with the land.

Before I leave this branch of the argument I should, I think, refer to the case of *Dewar* v. *Goodman* (3), which was pressed upon our attention with so much insistence by counsel for the defendant. That case is, in my judgment, plainly distinguishable from

(1) 1 B. & C. 410. (2) I. R. 3 C. L. 333. (3) [1908] 1 K. B. 94.

the present. There the thing covenanted to be done, namely, to keep in repair certain houses which were not the subject of the sub-demise, had no reference to what was the subject of the sub-demise. It did not touch the subject-matter of the sub-demise, nor did it support or maintain it in any way. It had no connection whatever with the corpus of the subject-matter sub-demised, or with the mode of enjoyment. There lies the distinction between the case of *Dewar* v. *Goodman* (1) and *Easterby* v. *Sampson* (2). No doubt the non-repair of the houses other than those sub-demised might lead to forfeiture of the estate of the lessee in all the houses, but this would not make the covenant in the under-lease run with the land. This is very clearly put in the judgments of Mr. Justice Jelf and Lord Justice Buckley. Mr. Justice Jelf is reported to have said (3)—"On principle Mr. Copping argued on behalf of the plaintiff that the covenant in question for performance of the covenants of the head lease does *pro tanto* touch or concern the thing demised in that, if performed, it secures the possession of it by preventing eviction on that ground by the superior landlord, and if not performed it forfeits the under-lease. I was at first much struck with this argument, and if the matter were *res integra* I should be inclined to adopt it; but an examination of the cases cited by Mr. Atherley-Jones for the defendant seems to point to a stricter interpretation of the rule, and to require that, in order to run with the land and the reversion, a covenant must directly, and not indirectly or collaterally, touch the land demised: see, for instance, *Thomas* v. *Hayward* (4), *Mayor of Congleton* v. *Pattison* (5), where Lord Ellenborough says a covenant is assignable 'if it affects the nature, quality, or value of the thing demised, independently of collateral circumstances, or if it affects the mode of enjoyment.'" Lord Justice Buckley is reported to have said—"The contention for the plaintiff may, I think, be summarized as follows: A covenant to do an act, not in respect of the demised premises, but which will protect from forfeiture the estate of the lessee in the demised premises, is a covenant which runs with the land." He added—"If that

(1) [1907] 1 K. B. 612; [1908] 1 K. B. 94.
(2) 6 Bing. 644.
(3) [1907] 1 K. B. at p. 622.
(4) L. R. 4 Ex. 311.
(5) 10 East, 130, at p. 135.

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proposition is true, it is wholly new. It may, nevertheless, be true, but I am not aware of any authority in support of it." He then examined the cases, and rejected the proposition. It is plain, I think, that the case of *Dewar* v. *Goodman* (1) is not an authority against the plaintiff.

But now I come to the 12th section of the Landlord and Tenant Act of 1860, and here arises a question of very great general importance. It is interesting from a legal point of view, and, as I said, is of great general importance. I desire to preface my consideration of the actual language, the *ipsissima verba* of the section, by some observations made by Lord Hatherley and by Lord Justice Holmes. Lord Hatherley is reported to have said, in giving judgment in *Liddy* v. *Kennedy* (2), a case in which there was a provision to resume possession of premises, but in which a severance of the reversion had taken place—"Now, as regards a condition of this kind, very many authorities have been cited to satisfy us that, after severance of the reversion, after this change in the interest of James Kennedy, great difficulty would be experienced, as matters stood under former decisions, in holding that this lease could be terminated, under any circumstances, by the effect of the proviso. But what has happened in Ireland has been this, that, although it may be held in Ireland that the statute of Hen. 8 (to which the statute of Car. 1 in Ireland was analogous), dealing with the interest of assignees of reversions, is not applicable to a case like this, where the reversion has been severed, and therefore does not enable persons, where the reversion has been parted with, to avail themselves of the previous construction of this proviso, yet the statute for Ireland of the 23 & 24 Vict. c. 154, entirely remedied that defect. It appears to me that this statute has been framed for the express purpose of removing some of these technical difficulties which stood in the way of justice, and which, though devised originally with logical regard to consequences, have been found in practice to involve far more frequently the failure of justice than to secure any beneficial result to the parties." To the same effect is the language of Lord Chelmsford. He says (p. 149):—"But then, supposing that under the Common Law this clause in the lease might be subject to the objection that

(1) [1907] 1 K. B. 91. (2) L. R. 5 H. L. 134, at p. 143.

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the reversion, or a portion of the reversion, was parted with, and that the power or condition, or whatever it may be called, would be subject to the objection that the power was entirely gone, we have in this case the Landlord and Tenant Act in Ireland, the 23 & 24 Vict. c. 154, which appears to me, whatever may have been the Common Law on the subject, to put the question upon an entirely different footing. The clauses of that Act to which attention has been directed appear to me to be perfectly clear on the subject. It seems to have been the intention of the Legislature that parties in the position of James and Victor Kennedy should be entitled to use the power which was conferred upon them for the purpose for which it was intended. Now what is the interpretation clause with regard to the word 'landlord.' It is to include the person for the time being entitled in possession to the estate or interest of the original landlord under any lease or other contract of tenancy, whether the interest of such landlord shall have been acquired by lawful assignment, devise, bequest, or operation of law, and whether he has a reversion or not. It was said by Mr. M'Mahon that this applies only to the case of the assignee of the original landlord, and not to the original landlord himself. It would be a very extraordinary state of things that the landlord by parting with a portion of an interest should give to the assignee a right, and by the same act should deprive himself of the right which he previously possessed in respect of the interest which he retains. But it appears to me, then, that the words, 'entitled to the estate or interest of the original landlord,' may very well apply to the case of James Kennedy, because James Kennedy is not in possession of the entire estate and interest of the original landlord. Thus the 12th section provides that 'every landlord of any lands holden under any lease or other contract of tenancy shall have the same action and remedy against the tenant and the assignee of his estate or interest, or their respective heirs, executors, or administrators, in respect of the agreements contained or implied in such lease or contract as the original landlord might have had against the original tenant or his heir or personal representative respectively.' "

In *Re M'Naul's Estate* (1), Holmes, L.J., when dealing with the

(1) [1902] 1 I. R. 114.

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rule of construction of statutes, is reported to have said (p. 138) :—"In *Riordan* v. *M'Namara* (1) I made some observations on this subject, which further experience has tended to confirm. We of a later generation, who have seen rampart after rampart of legal feudalism disappear before the steady inroad of legislative innovation, can hardly understand the difficulty which our predecessors had in realizing a fee-simple estate moulded and modified by statute. There is, however, one passage in the judgment of Barry, J., in *Morris* v. *Morris* (2) which sets forth the true nature of the estate taken by a grantee under the Act of 1849. 'Whatever be the effect,' he says, 'of the fee-farm grant, it can only have such operation as is conferred on it by the statute, and that operation is to be ascertained from the language of the Legislature construed according to the well-known rule, that every clause and every word must obtain its full and ordinary force and meaning, unless such construction would lead to some absurdity or some repugnance or inconsistency with the other provisions of the enactment.'"

I may also refer to a passage from the judgment of Jessel, M.R., in *Re Willey* (3), cited in the argument in *Re M'Naul's Estate* (4) : "I never allow my construction of a plain enactment to be biassed in the slightest degree by any number of judicial decisions or dicta as to its meaning, when those decisions or dicta are not actually binding upon me. I read the Act for myself. If I think it clear, I express my opinion about its meaning, as I consider I am bound to do. Of course if other Judges have expressed different views as to the construction, and their decisions are binding on this Court, this Court has simply to bow and submit, whatever its own opinion may be. But when there is no such binding decision, in my view a Judge ought not to allow himself to be biassed in the construction of a plain Act of Parliament by any number of dicta or decisions which are not binding on him."

Now then, applying these cases to the matter in hand, in the first place, there is no case which decides the question which presents itself on the 12th section of Deasy's Act. I omit for the present the valuable observations of Mr. Justice Andrews in the case of *Burrowes* v. *Delany* (5). But taking, as I am told to

(1) 30 L. R. Ir. 495. (2) I. R. 6 C. L. 73. (3) 23 Ch. D. at p. 127.
(4) [1902] 1 I. R. 114. (5) 24 L. R. Ir. 503.

take, the *ipsissima verba* of the section, is there anything to prevent my giving to them their ordinary meaning? Nothing that I can see. Having regard to the definition of the word "landlord," in the Act of Parliament, the words of the 12th section fit the case. It is plain that the words "during the continuance of the tenancy," which occur in the lease, point to a contractual matter—to use Mr. Justice Andrews' language, incident to the subject-matter of the tenancy. The Landlord and Tenant Act of 1860 has reference to "land," and contracts in reference to land, and the contract under consideration is calculated to affect the subject-matter of demise. The relation of landlord and tenant does not, as it did, rest upon tenure; it now rests upon privity of contract, and if the relation of landlord and tenant rests upon privity of contract, why should not an assignee be bound by an instrument in which the word "assigns" is used, when he takes under that instrument, and must be presumed to have known its contents? Is the landlord to do all the work which may be really necessary for the preservation of the subject-matter demised? and is the assignee, though specifically named, and enjoying the benefit that has accrued to the lands he occupies by work done in his time, to bear no part of the burthen? The defendant has entered on the subject-matter of the tenancy under an instrument of contract which uses the word "assigns," and now endeavours to renounce the contractual obligations which relate to the subject-matter of the contract. This, in my opinion, he cannot do.

GIBSON, J.:—

The sea-wall was for the common benefit of the landlord and various lessees; it was essential to preserve the property demised, to enable the lessee to perform his covenants as to that property, and to secure the road constituting the approach; it could only be maintained by entrusting the work to the landlord, as the entire length of sea-wall was necessary, and the maintenance could not be left to separate action of lessees dealing with fractions of the structure. Part of the consideration of the lease was the covenant to contribute, and the rent was thereby made less

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than it otherwise would have been. In these circumstances it seems startling to the ordinary intelligence that though the lessee should be bound, the assignee should not be.

Defendant's counsel, relying on *Spencer's Case* (1), contend—(1) That even if the covenant obliged the lessee to do the work himself, his assignee would have been under no such responsibility; (2) that even if he would have been, the covenant to contribute is only a collateral covenant to indemnify, not running with the land. For the plaintiff it is replied that—(1) the contribution was in substance part of the rent; (2) that the covenant ran with the land; (3) that even if it did not, Deasy's Act, sects. 12 and 13, transfers the obligation to the defendant.

The service of cleaning a parish church, ringing the church bell, keeping a grindstone for the use of a parish: *Doe* v. *Benham* (2), or labour for the landlord, may be rent, and the variable character of service or payment does not affect the character of rent: *Lloyd* v. *Keys* (3). By a trifling change in drafting the present lease contribution could have been made rent proper; it is in substance a payment by which the rent is reduced. This exhibits the extreme technicality of defendant's argument. It was not, however, introduced into the reddendum as rent, and was not I think, rent. The questions for consideration are, therefore, two. Did the covenant run with the land? If technically it did not do so, did Deasy's Act make the assignee liable?

1. In England, where the maintenance of sea-walls is the subject of express legislation, covenants like the present must often occur: see *Newport Union* v. *Stead* (4) (since reversed by the House of Lords), where, at p. 467, the form of the statute is given. There is no analogous Irish legislation. It was suggested for the plaintiff that the facts here throw on the lessor an implied duty to maintain the wall, and that on his failure to do so, the lessees could have entered to execute the necessary repair, as stated by Lord Romilly in *Morland* v. *Cook* (5). I have not felt it necessary to decide this point, which has not been sufficiently argued; and I will deal with the case on the basis that the lessor was not legally obliged to

(1) 1 Sm. L. C. (11th ed.), p. 55.
(2) 7 Q. B. 976.
(3) [1901] 2 I. R. at p. 421.
(4) [1907] 2 K. B. 460.
(5) L. R. 6 Eq. at p. 261.

maintain the wall, though of course in his own interest he would necessarily do so, and it was assumed he would. I have not found any case quite like the present. *Vyvyan* v. *Arthur* (1) was a case of service like rent. *Jourdain* v. *Wilson* (2) and *Athol* v. *Midland Great Western Railway* (3) were cases of quasi-easements attached to the demised premises. *Morris* v. *Kennedy* (4) is of the same type. And in *Sampson* v. *Easterby* (5), where the question was as to the benefit of the covenant running with the reversion, the smelting mill was part of the mining equipment which the lessee was to enjoy in specie. In *Vernon* v. *Smith* (6) the insurance money was to be spent on the premises. The only assistance derived from the cases is the principle they lay down. A covenant runs with land when it relates to the support and maintenance of the premises: *Bally* v. *Wells* (7), cited in *Vernon* v. *Smith* (6); or which affects the nature, quality, or value of the thing demised, independently of collateral circumstances; or which affects the mode of using it: *Mayor of Congleton* v. *Pattison* (8); or which affects the land itself during the term; or which, *per se*, and not merely from collateral circumstances, affects the value of the land at the end of the term; same case at p. 138. The present covenant appears to fall within the principle. The benefit of the covenant would seem clearly to run with the reversion, so that the landlord's grantee could sue the lessee on it: *Rogers* v. *Hosegood* (9), the reasoning in which is important. Must not the burthen equally so run? None of the cases cited for the defendant is in point. They all relate to covenants quite unlike the present. *Dewar's Case* (10) is plainly distinguishable, as there was a limited covenant for quiet enjoyment, and the covenant related to premises not demised. If the covenant for quiet enjoyment had protected the sub-lessee from the sub-lessor's default in performing the covenants in his own lease, that covenant would have certainly run with the demise. The covenant held not to pass had very much the same object. It is unnecessary to criticize the

(1) 1 B. & C. 410.
(2) 4 B. & Ald. 266.
(3) I. R. 3 C. L. 333.
(4) [1896] 2 I. R. 247.
(5) 9 B. & C. 505.
(6) 5 B. & Ald. 1.
(7) Wilmot's Notes, p. 344.
(8) 10 East, at p. 135.
(9) [1900] 2 Ch. 388.
(10) [1908] 1 K. B. 94.

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decision, as it is not in point here. In the present case, would not a covenant by the lessor to maintain the sea-wall have run with the land, both as to burthen and benefit? And would the result be different if the covenant was made conditional on the lessee's making contribution to the cost?

Mr. Harrison relies on several special grounds which make (he contends) the covenant collateral: the covenant only arises if the lessor expends money on repair, which he is not bound to do; the wall is at some distance from the leasehold premises; and the money payment is only an indemnity. No doubt the obligation only purports to attach if the repair has been necessary, and has been carried out; but the plain object was to secure the maintenance of the wall, which was assumed to be necessary for the common protection. The fact that a small space intervened between the holding and the wall—part of such space consisting of the road approach—cannot affect the real function of the wall as a shield to the premises. It is not necessary that the wall should be at the defendant's actual boundary; all the parts behind the wall in peril of sea erosion were benefited by it.

As to the covenant being for money contribution and not for physical repair, it is manifest that the wall as an entire thing must be maintained by one person, the landlord; and the only useful obligation that could be imposed on the lessees would be to assist financially. The recital in the statute mentioned in the *Newport Union Case* (1) and *Morland* v. *Cook* (2) illustrates this mode of aid. The money represents the value of the share of labour.

A further objection was that the benefit of the covenant could not run with the lessor's estate if the reversion was severed. The same difficulty would have arisen in *Vyvyan's Case* (3) (as pointed out in *Doe* v. *Reid* (4)), in *Sampson's Case* (5), and in *Coker* v. *Guy* (6). When there is such division, the problem often is not easy to solve. See, for example, *White's Case* (7), *Clegg* v. *Hand* (8), *The Manchester Brewery Co.* v. *Coombs* (9). As there

(1) [1907] 2 K. B. at p. 467.
(2) L. R. 6 Eq. 252.
(3) 1 B. & C. 410.
(4) 10 B. & C. at p. 857.
(5) 9 B. & C. 505.
(6) 2 B. & P. 565.
(7) [1897] 1 Ch. 767.
(8) 44 Ch. D. 503.
(9) [1901] 2 Ch. 608.

has been hitherto no such severance, I decline to pronounce any speculative opinion on future contingencies.

2. Assuming (contrary to my opinion) that in strictness the covenant would not have run with the land, does Deasy's Act, section 12, make the assignee liable? The section consists of two parts. The landlord has the same action and remedy against the assignee in respect of the agreements contained or implied in the lease or contract as the original landlord might have had against the original tenant; and the heir or representative of such landlord on whom his estate or interest under any such lease or contract devolves or should have devolved has the like action and remedy against the tenant and assignee for any damage done to the estate by breach of agreement in the landlord's lifetime as such landlord himself might have had. I agree with Mr. Harrison that the statute of 11 Anne, c. 2, s. 4 (Irish), gives no assistance; its object was in Ireland, by transferring privity of contract, to get rid of the absurd anomaly, discussed in the notes to *Mostyn* v. *Fabrigas* (1), that a lessor's action against an assignee, not being within the statute of Charles 1, and resting therefore on privity of estate, was local and not transitory. The Act was an amendment of the Act of Charles 1, and should receive the construction impressed on that enactment.

Putting the statute of Anne aside as irrelevant, I take up Deasy's Act. Though not in strictness a code, it covers, for future lettings, the entire relation of landlord and tenant, abolishing old real property principles, which it replaces by the law of contract. The necessity of a reversion disappears, and transmission of burthen and benefit under the contract no longer depends on the existence of a deed under seal. The assignee is put in the original tenant's place, whether assigns are named in the covenant or not. If the contract of tenancy is assigned, the lessee remains liable until discharged under sect. 16, meanwhile enjoying a right of indemnity against the assignee. Section 16 assumes that when the landlord gives the prescribed consent, the assignee is subjected to all the lessee's liabilities. The intention of the legislation is illustrated by such cases as *Bickford* v.

(1) 1 Sm. L. C. (11th ed.), p. 591.

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Parsons (1); *Buckworth* v. *Simpson* (2) and *Cornish* v. *Stubbs* (3). In a demise not under seal, the assignee could only be bound by being substituted under a new tenancy on the old terms: *Elliott* v. *Johnson* (4). By making the tenancy pass with all its liabilities the statute obtained the same result. The statute was intended to put the law of landlord and tenant in Ireland on a modern, simple, and intelligible basis, getting rid of feudal technical rules; and it falls within the observations of Holmes, L.J., in *M'Naul's Case* (5). The express language of sections 12 and 13 cannot be restricted or altered by forcing on it *Spencer's Case* (6) applicable to the law of covenants at common law, which was so precious in the eyes of legal schoolmen that they could hardly conceive a statute disregarding it. We must construe the enactment as it stands: *Vagliano's Case* (7). It introduced a wholly new and revolutionary principle, substituting contract for ancient real property law. The effect of sections 12 and 13 has attracted only little attention since 1860, and the authorities on the subject are few. In La Touche's Furlong, at p. 558, and in Nolan & Kane (3rd ed.), pp. 21 and 22, the view is taken that collateral covenants are transferred. In *Athol's Case* (8) and in *Morris* v. *Kennedy* (9) the covenants were held to pass; but the application of the statute was not discussed or considered. The only direct reported authority is the judgment of Andrews, J., in *Borrowes* v. *Delaney* (10), where he held that covenants "incident to the tenancy," though not strictly running with the land, came within the operation of section 13. In a late case (unreported) in this Division, in an action brought by a lessor for rent against an assignee, money had been lodged with the lessor under a provision in the lease appropriating it to the last year's rent of the term; the assignee of the lease obtained a fair rent order under the Act of 1887, reducing the rent; he was held by the Court, presided over by Palles, C.B., on new trial motion, to be entitled to use the money so lodged with the landlord in satisfaction of the rent sued for in the action, though, if the lease had not been determined by

(1) 5 C. B. 920.
(2) 1 C. M. & R. 834.
(3) L. R. 5 C. P. at p. 339.
(4) L. R. 2 Q. B. at p. 127.
(5) [1902] 1 I. R. at p. 138.
(6) 1 Sm. L. C. (11th ed.), p. 55.
(7) [1891] A. C. at p. 145.
(8) I. R. 3 C. L. 333.
(9) [1896] 2 I. R. 247.
(10) 24 L. R. Ir. at p. 517.

the Act of 1887, the time of appropriation had not arrived. I am not aware whether Deasy's Act was relied on. At the trial of this case before me no question was raised on the ground of want of contractual privity. The tendency of the speeches in *Liddy* v. *Kennedy* (1) also favours the wide construction of the statute.

The assignee is made subject to the same action and remedy as the original lessee, and so far as regards terms applicable to the contract of demise as a continuing obligation intended to bind the tenant for the time being, the assignee, who takes the benefit, cannot, as against the landlord, disclaim the burthen. If the intention expressed or implied in the contract is to attach to the tenancy, as part of the demise, obligations relating to the land which are to operate during the term against everyone holding under the contract, the assignee is made liable. On the importance of intention *Rogers* v. *Hosegood* (2) contains some interesting reasoning. It relates to benefit of covenants passing on a sale in fee, and does not directly bear on a demise, or contract liability of the kind created by Deasy's Act.

There may be terms depending on personal considerations and not capable of vicarious performance : *Tolhurst's Case* (3), which might not come within sections 12 and 13 ; and collateral agreements might be conceived so disconnected with the land and demise that they might not pass to the assignee. Such terms would be construed as not intended—*primâ facie*, at least—to apply or attach to the tenancy proper. It would be undesirable to attempt an exhaustive definition as to covenants which are within or outside the statute. Such cases as *Raymond* v. *Fitch* (4), *Doughty* v. *Bowman* (5), *Dewar's Case* (6) seem plainly within it. I confine myself to the question of principle. If the covenant here would have been collateral before 1860, the statute now makes it bind the assignee ; it concerns the very existence of the subject of demise ; it is expressly part of the consideration of the letting ; and was intended to impose liability on all owners of the tenancy during the entire duration of the term.

On both grounds, the nature of the covenant and the effect

(1) L. R. 5 H. L. 134.
(2) [1900] 2 Ch. 388.
(3) [1903] A. C. at p. 417.
(4) 5 Tyr. 985.
(5) 11 Q. B. 444.
(6) [1908] 1 K. B. 94.

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of the statute, I concur in the original conclusion of my brother Wright, in favour of the plaintiff.

MADDEN, J. :—

This is an action by a lessor against the assignee of a lease for 999 years upon a covenant in the lease. Two questions arise in the case: one of these depends upon the construction and effect of this particular covenant; and the other is of great general importance. The plaintiff contends, first, that the covenant upon which the action is founded is one which runs with the land, within the meaning of the second resolution in *Spencer's Case* (1), and the subsequent authorities; and, secondly, that if he should fail to bring the case within these authorities, the words of the 12th section of the Landlord and Tenant Act of 1860 are sufficiently wide to include certain covenants between lessor and lessee which would be regarded as collateral under the decisions upon the Act of Hen. 8, and the corresponding Irish statute of Charles 1. This section of the Act of 1860 now represents for Ireland the Act of 32 Hen. 8, c. 34, upon which *Spencer's Case* (1) was decided. It is undoubtedly, in certain respects, wider in its application than the Irish statutes which it superseded and repealed (10 Car. 1, s. 2, c. 4, and 11 Anne, c. 2). It extends to contracts of tenancy not under seal, and it is part of an enactment by which privity of contract is substituted for privity of estate, and by which the principles of tenure are no longer applicable to the relation of landlord and tenant. Thus it had the effect of doing away with much of the technicalities which led to a failure of justice under the older Acts. Whether it has the further effect of transferring the burden and benefit of a class of covenants which must be regarded as collateral under the decisions to which I referred, is a question of great importance, which I do not think it necessary to discuss, by reason of the opinion which I have formed upon the former of the questions which arise in the case. Having regard to the nature of the demised premises, and to the character of the covenant in question, I am clearly of opinion that it is one which touches and concerns the premises demised by the lease

(1) 1 Sm. L. C. (11th ed.), p. 55.

within the meaning of the resolution in *Spencer's Case* (1), as interpreted by subsequent decisions.

The premises so demised consist of a dwelling-house, one of a number of villas facing Ballyholme Bay. Each villa has a strip of garden running down to a road, and on the sea side of the road there is a grass slope or embankment, beyond which there is a sea-wall, constructed in 1884 by the predecessor in title of the plaintiff for the protection of his property, which is from its situation, and from the composition of the soil, liable to erosion and to consequent encroachment by the sea. It is found in the case that the whole of this wall is necessary for the protection of the coast, and that the result of the non-repair of a breach would be the destruction of the wall by the action of the waves admitted by the breach, and the consequent destruction of the roadway and ultimately of the subject-matter of the demise.

That a covenant which is conversant with the preservation and protection from destruction of the subject-matter of a demise may be fairly regarded as one which touches and concerns it, is a proposition which commends itself to general acceptance. But the second resolution in *Spencer's Case* (1) has been overlaid with so complicated a mass of technicalities that it behoves us to consider whether any principle has been laid down in decided cases, in obedience to which we are bound to act in applying to any particular covenant the apparently plain and simple language of the resolution.

The defendant contends that this covenant should be regarded as collateral for three reasons. First, because it is conversant with a thing to be done on the land of the reversioner, and not on the demised premises. Secondly, because the subject-matter of the covenant is the payment of money otherwise than by way of reddendum under the demise; and thirdly, she relies on the decision of the English Court of King's Bench in *Dewar* v. *Goodman* (2) as laying down a principle which we ought to apply to the present case.

As regards the first of these contentions, I should be disposed to regard as collateral a covenant by a lessee to build a house, to repair a wall, or to do any other work on land outside the demised

(1) 1 Sm. L. C. (11th ed.), p. 55. (2) [1908] 1 K. B. 94.

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premises, even though it were on the land of the reversioner, in the absence of some clearly established relation between the work to be done and the user and enjoyment of the demised premises. When such a relation exists, there is ample authority for treating the covenant as one which runs with the land.

The existence of this relation may be established in different ways. In *Vyvyan* v. *Arthur* (1) the covenant was by the lessee of certain land to grind corn at a mill situated on the land of the lessor. "It is said that as the thing required to be done by the covenant is not to be done upon the land demised, but upon other land which might or might not continue to be the land of the lessor, it does not, therefore, respect the land demised, and, consequently, that the assignee cannot take advantage of the covenant. I am of opinion, however, inasmuch as the thing to be done is to be done at a mill which belonged to the lessor at the time of making the lease, and which has always continued to belong to the owner of the reversion of the land demised, that the covenant to be implied from the reddendum is in the nature of a covenant to render a rent, and, consequently, that it is a covenant that ran with the lands" (*per* Holroyd, J.). Best, J., observes (p. 417): "The general principle is that if the performance of the covenant be beneficial to the reversioner, in respect of the lessor's demand, and to no other person, his assignee may sue upon it; but if it be beneficial to the lessor without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue."

The Court in that case was enabled to apply these general observations to the covenant before it by regarding it, by way of implication from the reddendum, as in the nature of a covenant to pay rent; and Mr. Overend, in an ingenious argument, has endeavoured to call in aid the particular reasoning upon which *Vyvyan* v. *Arthur* (1) was decided. But, to my mind, the connexion in this case between the covenant and the demise is so direct that it is unnecessary to have recourse to the artificial reasoning upon which that decision was founded, even if it were applicable to the present case. I can conceive no relation more close than that

(1) 1 B. & C. 417.

between a house built on the sand, and the sea-wall which protects it from the action of the sea. The encroachment of the sea along a portion of our coasts is a matter of common knowledge; and the right to protection by the natural barrier of sand and shingle, or by artificial walls or embankments, has come before our Courts in various forms. The case of *Morland* v. *Cook* (1) was not a case between landlord and tenant, and is not directly in point as regards the present case. But it is of value, as illustrating the close relation which, in the eye of a Court of Equity, as well as a matter of common understanding, exists between land liable to encroachment from the sea, and the maintenance of the protecting sea-wall.

Inasmuch as the covenant in the present case is conversant with the preservation of the subject-matter of the demise, it touches and concerns the things demised more directly than a class of covenants which have been always regarded as running with the land. I refer to covenants which affect the user of the demised premises; by which I mean the mode of user, and not the profit to be derived from the user, for covenants of the latter class are only collateral: *Thomas* v. *Hayward* (2). The case of *Easterby* v. *Sampson* (3) is an authority for the proposition that a covenant by a lessee affecting the user of the demised premises will run with the land, although the act to which the covenant relates is to be done on land of the lessor, outside the limits of the demised premises. The covenant in *Easterby* v. *Sampson* (3) was to build a new smelting-house on a part of the lessor's waste land which was not included in the demised premises, but adjoined them. It was held by the Court of Exchequer Chamber, affirming the decision of the Court of King's Bench, that, inasmuch as the covenant affected the mode of enjoying and using the thing demised, the principle laid down by Lord Ellenborough in *Mayor of Congleton* v. *Pattison* (4) applied. "It is impossible to doubt that the demise of the mines is immediately connected with the possession of the smelting-mill" (*per* Alexander, C.B., at p. 650). Upon the same principle it has been decided in several cases, of which the decision of the Court of Appeal in

(1) L. R. 6 Eq. 252.
(2) L. R. 4 Ex. 311.
(3) 9 B. & C. 505; 6 Bing. 644.
(4) 10 East, 135.

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England, *Clegg* v. *Hands* (1), may be taken as an example, that a covenant as to the manner in which a particular business is to be carried on upon the demised premises will run with the land.

I now proceed to consider the second point relied on by the defendant's counsel—the circumstance that the covenant is conversant with the payment of moneys. In *Vernon* v. *Smith* (2) the lessee of certain premises situated within the weekly bills of mortality covenanted with the lessor at his own expense to insure the demised premises in a certain amount in a public office in London or Westminster. Under the provisions of 14 Geo. 3, c. 78, the landlord of premises lying within those limits had a statutory right to have the amount of the insurance laid out in rebuilding the premises. This circumstance, in the opinion of the Court of King's Bench, brought the case within the principle thus stated by Abbott, C.J.: "A covenant to lay out a given sum of money in rebuilding or repairing the premises, in case of damage by fire, would clearly be a covenant running with the land, that is, such a covenant as would be binding on the assignees of the lessee and which the assignee of the lessor might enforce." There are some observations in the judgment of Best, J., which are applicable to the present case—"A covenant in a lease of which the covenantee cannot, after his assignment, take advantage, and which is beneficial to the assignee as such, will go with the estate assigned. If this were not the law, the tenant could hold the estate discharged from the performance of one of the conditions on which it was granted to him. The original covenantee could not avail himself of this covenant; he sustains no loss by the destruction of the buildings, and, therefore, has no interest to have them insured. . . . By the terms *collateral covenants* which do not pass to the assignee, are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate."

In *Vernon* v. *Smith* (2), as in the present case, the covenant was to be performed by the payment of money. The money paid could not, as in *Vyvyan* v. *Arthur* (3), be regarded as in the nature of rent. It was money to be paid to a stranger, not, as here, to the lessor. The connection between the money and the

(1) 44 Ch. D. 503. (2) 5 B. & Ald. 1. (3) 1 B. & C. 417.

demised premises depended on the fact that the expenditure would result in the restoration of the premises if destroyed by fire. In the present case the money is to be paid for protection against destruction by water. Restoration and preservation are no doubt different things, but I can see no distinction between these things relevant to the question how far each of them touches and concerns the subject-matter of the demise.

It remains to consider the question of the application to the present case of the decision of the English Court of Appeal in *Dewar* v. *Goodman* (1) on appeal from Jelf, J. (2). The distinction between that case and the present becomes apparent on reading the following passage in the judgment of Buckley, L.J.: "The construction for the plaintiff may I think, be summarized as follows:—A covenant to do an act, not in respect of the demised premises, but which will protect from forfeiture the estate of the demised premises, is a covenant which runs with the land. If that proposition is true, it is wholly new. It may nevertheless be true, but I am not aware of any authority in support of it." The distinction here taken between the estate of the lessee in the demised premises, and the demised premises themselves, is the foundation of the judgment of the learned Lord Justice. The same distinction runs through the judgment of Lord Alverstone, C.J.: "The covenant in the present case is a covenant to do something on land which was not the subject of the demise, but it is contended for the plaintiff that, as the performance of the covenant was for the benefit and protection of the sub-lessee, and concerned his interest or estate in the land, that is sufficient to bind the assigns; and cases were cited for the purpose of showing that the terms 'estate' and 'land' were in this construction to be treated as equivalent. But the important thing to observe with regard to the cases cited was that in every one of them the covenant did touch and concern the land demised, in the strictest sense of the word" (p. 103). And further on, at p. 104, he uses the words "interest of the lessee in the land demised" as denoting something different from the land itself, or the user of the land. It is evident from the concluding portion of the judgment of Jelf, J.,

(1) [1908] 1 K. B. 94. (2) [1907] 1 K. B. 612.

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at p. 623, that if he had not been hampered by the technicalities which have been engrafted upon the clear and simple language of the resolution in *Spencer's Case* (1), he might have held with counsel for the plaintiff that "the covenant in question for performance of the covenants of the head lease does *pro tanto* touch or concern the thing demised in that, if performed, it secures the possession of it by preventing eviction on that ground by the superior landlord, and if not performed it forfeits the underlease." "It may be," he added, "that the Court of Appeal, if the case is carried there, may be able to take a broader view of the matter, and to break through the legal technicalities which a Court of first instance feels constrained to observe."

The particular gloss on *Spencer's Case* (1) by which Jelf, J., was chiefly influenced was a passage in the judgment of Lord Ellenborough in the case of *Mayor of Congleton* v. *Pattison* (2), to which I have already referred, where he says that a covenant is assignable if it affects the nature, quality, or value of the thing demised, independently of collateral circumstances, or if it affects the mode of enjoyment. Here is to be found the true ground of distinction between the present case and *Dewar* v. *Goodman* (3). A covenant relating to the preservation from destruction of the thing demised, affects not merely its nature, quality, or value, but its very existence. Without discussing the grounds upon which it was decided that the covenant in *Dewar* v. *Goodman* (3) did not come within the resolution in *Spencer's Case* (1), we can have no difficulty in discerning, or acting upon, the essential difference which exists between the relation borne by the covenant in that case to the title to the premises, and in the present case to the very subject-matter of the demise.

A question was suggested during the argument, which if answered in the affirmative would be conclusive of the case: whether a covenant is not implied on the part of the lessor to maintain a protection to the demised premises, the repair of which is admitted to be necessary. The existence of such a liability on the part of the lessor, and the mode of enforcing it—whether by action at law, or by proceeding in equity, in which

(1) 1 Sm. L. C. (11th ed.), p. 55. (2) 10 East, 135. (3) [1908] 1 K. B. 94.

the lessee would be a plaintiff, and the lessor and the other contributory lessees defendants—are questions of some nicety, as to which I should not like to express an opinion without further consideration and argument. It is not necessary for me to do so, for I am clearly of opinion, for the reasons which I have stated, that the covenant on the part of the lessee, regarded as unilateral, is one which nearly touches and intimately concerns the demised premises, and therefore runs with the land.

KENNY, J. :—

Two matters have to be borne in mind in dealing with this case : the one, that the claim arises out of and in connection with the relation of landlord and tenant, and the other, that the person who is suing is the original lessor in whom is vested the property in both the wall and the reversion expectant on the determination of the defendant's lease. It is the lessor who, as such owner of the reversion and of the wall, has made the outlay in the repair of the latter. The only point in the case is whether the assignee of the lessee's estate is liable under the covenant for a proportionate part of the expenses incurred in the carrying out of a work which, on the facts as stated by Wright, J., is essentially necessary for the preservation of the defendant's house and premises. So far as merits are concerned they would seem to be altogether on the side of the plaintiff.

It is said that this covenant for contribution is not one that runs with the land so as to lay the burthen of its performance on the shoulders of an assignee of the lessee's estate; that it is a mere collateral covenant, not touching or concerning the demised premises; and that while the lessee might be personally liable on foot of it, his assignee is under no such liability to the owner of the reversion. Even if that contention were correct, it might not save the defendant from ultimate liability, for, if the assignment from the lessee to the defendant be properly drawn, it will most likely be found to contain a covenant on the part of the defendant to indemnify the lessee from the effects of any breaches of the covenants contained in the lease. However that may be, we have

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to deal only with the question of liability between the reversioner and the assignee of the lessee's estate.

The branch of our law conversant with the subject of covenants running with the land is of an extremely technical character, and the authorities that bear upon it are in many instances on the border-line and difficult of application to any set of circumstances other than those on which they rest. All the cases establish that if the covenant be purely personal and collateral to the thing demised it does not run with the land—while, on the other hand, if it touches or concerns the subject-matter of the tenancy, it does run with the land and is binding on assignees of the covenantor's estate. In some of the cases a more exhaustive definition of a covenant running with the land will be found.

In *Sampson* v. *Easterby* (1) it was held to run with the reversion on the ground that the thing covenanted to be done tended to the support and maintenance of the thing demised. In *The Mayor of Congleton* v. *Pattison* (2) Lord Ellenborough in his judgment declares that the covenant would bind the assignee "if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances, or if it affected the *mode of enjoying it*"; and in *Athol* v. *The Midland Great Western Railway Co.* (3), Whiteside, C.J., in delivering the judgment of the Court refers to the covenant in that case as relating "directly to the nature and occupation and enjoyment of the very thing demised and connected with it." Cotton, L.J., in his judgment in *Austerberry* v. *The Corporation of Oldham* (4), discusses the two classes of covenants, and at p. 776, says:—"In order that the benefit may run with the land, the covenant must be one which relates to or touches and concerns the land of the covenantee . . . Looking at the terms of the covenant it is . . . not a covenant having a direct reference to the land, or the enjoyment or the benefit of the land of the covenantee." *Clegg* v. *Hands* (5) was also a case relating to the benefit of a covenant running with the reversion, where the demise was of a public-house, and the lessee had covenanted to buy all his beer from the lessors whose assignees were the plaintiffs At

(1) 9 B. & C. 505; 6 Bing. 644.
(2) 10 East, 130.
(3) I. R. 3 C. L. 333.
(4) 29 Ch. D. 750.
(5) 44 Ch. D. 503.

the close of his judgment, Lopes, L.J., says :—"In my opinion, it touches and concerns the demised premises; it affects the mode of enjoyment of the premises, and, therefore, it runs with the reversion." On the other hand, *Thomas* v. *Hayward* (1), if it be still good law, is an authority for this—that touching the beneficial occupation of the thing is not equivalent to touching or concerning the thing itself. Lord Alverstone, C.J., in *Dewar* v. *Goodman* (2) remarks that "it is said that *Thomas* v. *Hayward* (1) cannot now be considered as good law," but he adds that he cannot accept that view; but Buckley, L.J., considers that the Chief Justice has placed too much reliance on it, and proceeds to distinguish it. In my opinion, the covenant in the present case is directly connected with the demised premises. It was entered into as part of a scheme for the protection of, amongst others, the lessee's villa residence, which might, in the absence of the wall in question, suffer material damage from the encroachments of the sea. If the lease had been taken without any reference to this wall, it might have become necessary for the defendant, in order adequately to protect his own premises, to take steps for the repair of the wall. I rather incline to the opinion that a frontager to the sea in his position could take steps of this nature. If he were obliged to do so, how was he to be repaid his outlay beyond the proportion of it which his own premises ought to bear? I think the covenant affords an answer. Furthermore, the lessor might have assumed sole liability for the maintenance of the wall, and, if he did, it is not unreasonable to conclude that the rent reserved would have been larger. In my opinion, it follows that there was a consideration for the covenant arising from the very nature, value, and condition of the thing demised. Apart from this, the covenant may be regarded as one to co-operate for the purpose of maintaining a work that is a common protection to the demised premises and to the lessor's other property. If, as is found by Wright, J., the wall is so essential to the continued existence of the defendant's house, cannot it be regarded as in a sense partaking of the very essence of the frontagers' houses, and being part and parcel of the very premises themselves? In my opinion, the latter

(1) L. R. 4 Ex. 311.

(2) [1908] 1 K. B. 94; affirmed H. L., W. N., 1993, p. 250.

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are so dependent on it for not alone stability, but their very existence as habitable structures, that it is as much a part of the premises as their very foundations. The covenant contemplates the doing of an act on premises so situated, and to my mind is equivalent to a covenant providing for the apportionment of outlay on the premises specifically demised by the lease. If the covenant was one to repay the lessor any outlay he might expend on the premises within the ambit of the lease, there could be no doubt that such a covenant would run with the land.

A case, *Morland* v. *Cook* (1), not unlike the present, came before Lord Romilly, M.R., in 1868. In one particular it differed from it, namely, that it was not a case of landlord and tenant, but one in which the covenant was contained in a partition deed. The several parties to the deed mutually covenanted with one another that the expense of maintaining a sea-wall should be borne by them, their heirs and assigns, out of the partitioned lands in proportion, and by an acre-scot, payable thereout. It was impossible to say in which of the parties the ownership of the wall—which constituted the southern boundary of the land—was vested. The defendants' lands were situated just within the wall, and did not anywhere abut on the sea. The defendants were assignees, and the suit was instituted for a declaration that they were bound to contribute to the repair of the wall. It was argued that the covenant ran with the lands, and also that it was in affirmance of a common law liability, and *Rex* v. *Commissioners of Sewers in Essex* (2) was relied on. Lord Romilly, in giving a decree in favour of plaintiffs, said that the thing to be done by force of the covenant was annexed to and appurtenant to the land partitioned —which goes with the land and binds the assignee though not mentioned.

Morland v. *Cook* (1) is open to the observation that the contribution was by the partition deed actually made a charge on the contributory land, and this criticism was directed against its weight in the case to which I have already referred of *Austerberry* v. *The Corporation of Oldham* (3), where the Court held that a covenant in a purchase deed to maintain a road did not run with

(1) L. R. 6 Eq. 252. (2) 1 B. & C. 477. (3) 29 Ch. D. 750.

the land adjoining. Cotton, L.J., in that case, while admitting to some extent the force of this objection, does not express disapproval of the actual decision or of the arguments by which Lord Romilly justified it. He even adds (p. 777), "but as regards benefit, a covenant for the keeping up of a sea-wall which would prevent the land in question owned by the plaintiff from being flooded was undoubtedly a covenant with reference to the benefit to be enjoyed by the land by the keeping of the sea out." Lindley, L.J., considered that *Morland* v. *Cook* (1) was intelligible on the ground that the expense was practically created a rent-charge out of the lands. Fry, L.J., expressed a less decided opinion as to the benefit of the covenant not running with the land, and added that he was more inclined to think that the road in question was so far an incident to the use and occupation of the adjoining lands that it might be conceivable that it came within the principles of "covenants relating to things incident to the land."

I am therefore of opinion that the covenant in the present case runs with the land, and that the defendant, as assignee, is liable for her proper proportion of the expenses of repair incurred by the plaintiff.

As to the other point that was argued, namely, that, whether the covenant ran with the land or not, it was one that came within the 12th section of Deasy's Act, it is enough for me to say that I am of opinion that the liability to contribute to the repair of the wall was an incident of the tenancy when the defendant purchased the lessee's interest, and that as assignee of that interest she is liable under the section for the contribution.

Solicitors for the plaintiff: *Wellington Young & Son.*
Solicitor for the defendant: *John M'Kee.*

J. G. T.

(1) L. R. 6 Eq. 252.

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Oct. 27–29.
Nov. 5.
Appeal.
Dec. 2, 3.

In re GRANGEMELLON (CO. KILDARE) ELECTION PETITION (1).

Local Government election—Rejection of nomination paper—Petition presented between day of nomination and day fixed for election in case of contest—Whether premature—Waiver by respondent.

At an election to fill two vacancies on a Rural District Council, A, B, and C were nominated as candidates on the 28th April, the County Council having previously fixed the 27th May as the day for election. The returning officer rejected A's nomination paper, and, on the 15th May, A presented a petition to set aside the election of B and C. B entered an appearance by solicitor on the 25th June. Notice of trial was served on the 12th June for the 25th June. When the trial came on before the Commissioner duly appointed by the Judges on the Rota, B, without having made any application to the Divisional Court to stay the proceedings, to dismiss the petition, or for a writ of prohibition, appeared before the Commissioner by counsel, who objected that the petition was premature, having been presented before the date of the election, which, he contended, was the 27th May, and that the Commissioner had no jurisdiction to try the case; but cross-examined the petitioner's witnesses, and went into evidence on B's behalf:—

Held, without deciding whether the 28th April or 27th May was the day of the election, and assuming the petition to have been presented prematurely, this would not have the effect of nullifying the proceedings, but was an irregularity capable of waiver, and which had been, in fact, waived by B.

The judgment of the King's Bench Division affirmed by the Court of Appeal.

Case Stated under section 93 (8) of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), by Thomas Henry Maxwell, Barrister-at-Law, Commissioner for the trial of the Local Government Election Petition, for the opinion of the King's Bench Division. The material paragraphs of the case stated are set forth in the judgment of the Lord Chief Justice.

William M'Grath, for the respondent Bolger.

(1) In the King's Bench Division, before Lord O'Brien, L.C.J., and Madden and Kenny, JJ.

James O'Connor, K.C., and *Alfred Coffey*, for the petitioner.

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The following cases were referred to—*Pearks* v. *Richardson* (1); *Forbes* v. *Smith* (2); *Fry* v. *Moore* (3); *Preston* v. *Lamont* (4); *Oulton* v. *Redcliffe* (5); *Tipperary Election Petition* (6); *Moore* v. *Gamgee* (7); *Dierken* v. *Philpot* (8).

Nov. 5.

LORD O'BRIEN, L.C.J. :—

This is a very peculiar case. It comes before us upon a case stated by Mr. Maxwell, a Commissioner duly appointed to hear an election petition for the District Electoral Division of Grangemellon in the County Kildare.

It was contended that Mr. Maxwell had no jurisdiction to try the petition he was appointed to try, and he was asked to state a case. Well, if he had no jurisdiction in the matter, it follows that he had no jurisdiction to state a case for the opinion of this Court. It is said that there is statutory authority to reserve matter for the consideration of the Court, but that plainly refers to matter arising in the course of the case, extrinsic to the question of the Commissioner's jurisdiction. It does not refer to a matter upon which his own jurisdiction to proceed depends —indeed it seems to me to imply that the Commissioner has jurisdiction, because the very power to reserve a case for this Court implies that he has jurisdiction and authority to do so. It proceeds on the assumption that he is a Commissioner authorized to act, and not a mere unauthorized individual equipped with no authority. The case fully states the facts—it is better to read it :—

"1. On 28th April, 1908, there were two vacancies for the Rural District Council of Grangemellon, for which there were three candidates and no more, namely, the petitioner Mathew Joseph Minch, and the respondents, Michael Bolger and Laurence Stanislaus Dunne.

"2. The nomination of candidates took place on 28th April,

(1) [1902] 1 K. B. 91.
(2) 10 Exch. 717.
(3) 23 Q. B. D. 395.
(4) 1 Ex. D. 361.
(5) L. R. 9 C. P. 189.
(6) 3 O'M. & H. 19.
(7) 25 Q. B. D. 244.
(8) [1901] 2 K. B. 380.

K. B. Div. 1908, and the County Council had fixed as the day for the election, pursuant to the Local Government Ireland Act, 1898, and the rules thereunder, the 27th May, 1908.

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In re GRANGE-MELLON ELECTION PETITION.

Lord O'Brien, L.C.J.

"3. There was one nomination paper only for each candidate. The three nomination papers were in the forms marked respectively A, B, and C, which I incorporate in this case, and were put in evidence.

"4. Mr. Martin E. Doyle, the deputy returning officer, rejected the nomination paper in which the petitioner was nominated, for the reason stated thereon; and on 15th May, 1908, the petitioner presented the petition herein (1).

"5. On 22nd June, an order was made by the King's Bench Division striking out the said Martin E. Doyle as a respondent; and pursuant to notice of trial dated 11th day of June, 1908, the case came before me for hearing on 29th day of June, 1908, at Monasterevan.

"6. At the hearing and during the statement of the petitioner's case by his counsel, Mr. James O'Connor, K.C., Mr. M'Grath, counsel for the respondent Bolger (the respondent Dunne did not appear), contended that the petition was premature, on the ground that it had been presented prior to the day fixed for the election. I informed Mr. M'Grath that I would hear him on the point later. Counsel for the petitioner concluded his statement and went into evidence, and the witnesses for the petitioner were cross-examined by Mr. M'Grath.

"7. Mr. M'Grath then repeated his objection, and then called a witness on the question of fact involved in the petition; counsel on both sides addressed the Court on the law and facts. Counsel for the petitioner contended that Mr. M'Grath, having gone into evidence, was precluded from relying upon the preliminary objection.

"I overruled Mr. M'Grath's contention on the following grounds, namely:—

"1. That, if valid, such objection should have been taken by application to the King's Bench Division to disallow or dismiss the petition, and before notice of trial was served.

(1) The ground of rejection was that the petitioner was described as Mathew J. Minch.

"2. That the King's Bench Division had made orders in the matter on the assumption of its validity, and that I was bound thereby, and that therefore it was too late for the said respondent to raise such objection at the trial.

"3. That I was of opinion that the day on which the deputy returning officer rejected the nomination of the petitioner was in the circumstances of this case 'the day on which the election was held' within the meaning of section 88, sub-sect. 4, of 45 & 46 Vict. c. 50, and that therefore the petition herein was not premature, and that I was bound to hear and determine the question raised thereby, which I accordingly did, holding that the election was void.

"The question for the Court is, whether the objection of the respondent's counsel was valid or not?"

These are the facts, succinctly set forth; and it is well to see what the dates are. The day of nomination was the 28th April, 1908. The day fixed for election was the 27th of May. Between these two dates, namely on the 15th May, the petition was presented. On the 18th May the petition was served. Notice of trial was dated the 11th June; the date of appearance was the 25th June, and the date of hearing the 29th June.

I quite agree with the first ground of refusal to comply with the application made by counsel for the respondent. I am of opinion that such objection should have been made by application to the King's Bench Division, if at all. The respondent plainly lapsed his opportunity. Instead of moving in this Court, which, *ex concessis*, he might have done when he had been served with the petition and the notice accompanying it, he filed, on the 25th June, 1908, after the so-called day of election had passed, an appearance in the following terms:—

> "TAKE NOTICE, that the respondent, Michael Bolger, has appointed Patrick J. Byrne, of No. 32, Bachelor's Walk, in the city of Dublin, solicitor, to act as his agent herein. And that the address at which notices addressed to the said respondent, Michael Bolger, may be left is No. 32, Bachelor's Walk, in the city of Dublin.
>
> "Dated this 25th day of June, 1908.
>
> "P. J. BYRNE.
>
> "*Solicitor, Agent for the Respondent.*"

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What was the effect of this notice of appearance? Did it not clearly imply that the proceeding initiated by the petition was to go on—that it was to run its usual course, and that it was not to be cut short by an objection to the jurisdiction—that, in fact, the race was to be run on the ground selected; that the controversy to be fought out was, whether the returning officer's rejection of the nomination, for the reason he rejected it, could be sustained? Beside all this, there were various steps taken as to security for costs, and bringing the case to an issue. When the various provisions as to security for costs were complied with, the matter was deemed to be at issue. Again, notice of trial was served on the respondent Bolger, and he takes no step to set aside that notice of trial, nor did he appear on the application to strike out the returning officer as a respondent, though served with the notice of the application to do so. He did not then come in to set aside or stay the proceeding as being a nullity. A Commissioner is appointed, and the subject-matter of controversy—the only issue as to the name of the petitioner—is sent down to the Commissioner to be determined by him.

The order to be made by the Rota Judges is in the form following:—

THE LOCAL GOVERNMENT (IRELAND) ACT, 1898.

IN THE MATTER OF THE LOCAL GOVERNMENT ELECTION PETITION FOR ,

Between , *Petitioner*,

And , *Respondent*.

WE, being the Judges on the Rota for the trial of Parliamentary Election Petitions in Ireland, do hereby assign the trial of the said Petition to Mr. Commissioner . And do hereby fix the time and place of the trial of the said Petition for , the day of , 19 , at . And do hereby nominate and appoint Mr. to the office of Registrar of the Election Court for the trial of the said Petition. And do hereby nominate and appoint Mr. to be the short-hand-writer of the said Election Court.

Dated this day of , 19 .

Now, it is contended that the Commissioner is in the first instance to set about ascertaining his own status and whether there is any controversy before him at all. In fact, he is to determine whether he is to walk out of Court a private individual and not to try the issue which he was commissioned to try. I am of opinion he was fully justified in not doing this. I may mention here a case for which we are indebted to the industry of my brother Kenny, who referred us to it—the case of *Dierken* v. *Philpot* (1). In that case an action had been brought for a sum exceeding £100. When it came before the Master, the excess over £100 was abandoned, and the Master remitted it for trial before a County Court Judge. When it came on for trial before the County Court Judge, the point was made that there was no jurisdiction in the Master to make the order he did make, that the excess over the £100 was not so abandoned as to give the Master authority to remit, and that there was no jurisdiction in the County Court Judge to hear the case. A writ of prohibition was applied for and refused. Lord Alverstone, in giving the judgment of the Court, said:—"Such a course of action obviously tends to put both the Judge and the plaintiff in a difficulty; if the defendant's contention is right, it involves the necessity of a preliminary inquiry by the County Court Judge at the trial as to whether the Master's order was made under such circumstances as to be binding upon him. There being an opportunity of appealing against the order of which the defendant did not choose to avail himself, I do not think we ought to prohibit the County Court Judge after he has in fact tried the action. I agree with the defendant's counsel that where there is excess of jurisdiction at any time a writ of prohibition may issue; but I do not think there was in this case any excess of jurisdiction when the matter was before the County Court Judge. It was contended that the County Court Judge had the original writ before him, and that he could see from it that the claim indorsed was for £116, and that, therefore, there must be excess of jurisdiction in trying the case in the County Court. But it is to place an undue burden upon a County Court Judge if he is to be compelled to decide whether or not he shall

(1) [1901] 2 K. B. 380.

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obey an appealable order against which no appeal has been brought." I am of opinion that, if the objection could be taken at all, it should be taken by application to the Court, and that even in this Court the application would have have been late if not taken till the day upon which it was taken before Mr. Maxwell. The respondent Bolger had filed and served the notice which I have read of the 25th June, 1908, and every step had been taken to bring the case to issue and without any application by Mr. Bolger to set the proceedings aside.

The day of election, assuming it to be the 27th May, had passed. Notice of trial had been served, and a commissioner appointed to try the issue knit on the petition.

There then existed a subject-matter cognizable by this Court; and, in my opinion, under all the circumstances there was—to use the language of Denman, J., in the case of *Oulton* v. *Radcliffe* (1) —"jurisdiction to proceed." I would, I think, more accurately describe the position by saying that under all the circumstances the respondent Bolger had precluded himself from denying there was jurisdiction to proceed.

The case of *Oulton* v. *Radcliffe* (1) is a useful case—let me examine it. I do not of course say that the facts are all the same as in this case, but the observations of the Judges are useful.

The marginal note tells us what was decided:—"A writ was issued out of the Court of Common Pleas at Lancaster, which is a Superior Court, for a cause of action cognizable by that Court, but which arose beyond its jurisdiction. The service was upon the defendant's attorney beyond the jurisdiction; and he gave an undertaking to appear, and did appear for the defendant:—*Held*, that the irregularity in the service was cured by the appearance,"

Williams, who argued the case very clearly, contended "if the party be served out of the jurisdiction, the cause being one over which the palatinate Court has a *general* jurisdiction, and he chooses to appear, all irregularity is waived."

The Judges acceded to that argument, and let me see the way they put it. Brett, J., afterwards Lord Esher, said:—"It is true that a party residing out of the jurisdiction cannot be compelled

(1) L. R. 9 C. P. 189.

to come before the Court without service of the writ, or that which amounts to service: that would be contrary to natural justice. But, however irregular a writ may be, no objection can be taken to it on that ground after the defendant has chosen to appear to it. I must not be understood as going the length of saying (indeed my impression is the other way) that if the Court had no jurisdiction over the subject-matter of the action at all, the defendant's consent by appearing would confer jurisdiction." Denman, J., said: —"Actual service of the writ is not essential. If the defendant appears, that gives the Court jurisdiction to proceed, provided the subject-matter of the action is one over which the Court has jurisdiction."

My view is that the Court has a *general* jurisdiction over the subject-matter, and that the respondent, Bolger, by his appearance and standing by and letting matters proceed as he did, precluded himself from raising the want of jurisdiction in this particular case. If the jurisdiction depended on the petition being presented at an appropriate time when there was a subject-matter of controversy, I think the respondent by his conduct has precluded himself from contending that the petition was not presented at an appropriate time. He took no step to arraign the jurisdiction till after the day fixed for the election had passed, and he led the petitioner to believe that the sole matter in controversy was the question put forward in the petition.

The parties—having regard to all the facts—plainly went down on the basis that the day of presentation of the petition was right, and that there was nothing in controversy except the action of the returning officer in rejecting Mr. Minch's nomination paper. But if this Court was not the proper and exclusive tribunal for such an objection, what would be the result? That vast expense would be incurred—special counsel retained at considerable expense, perhaps a host of witnesses summoned, never to be examined. The petitioner might have acceded to the objection if made in time, and saved himself very considerable expense; but the respondent induced him to incur very considerable expense by inducing him to believe that the petition was to run the usual course up to a hearing upon the question raised by the petition. It is plain, in my opinion, that such an objection is for this Court

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exclusively; and even if made here on the day the petition was heard, it would, having regard to all the circumstances, have been late. The respondent had by his conduct precluded himself from making the objection.

This is enough to dispose of the case. It is not necessary to determine the question as to the day of election.

The question reserved by the case must be answered in the negative, and the respondent Bolger must pay the costs.

Madden, J.:—

On the day on which Mr. Commissioner Maxwell adjudicated on the petition of Mathew Minch an election had been held for the purpose of filling two vacancies in the Rural District Council of Grangemellon. The validity of this election was a matter cognizable by the Commissioner to whom it had been referred by this Court; and, so far as the subject-matter of the petition was concerned, it was within the general jurisdiction of the tribunal.

According to one view of the statutes and rules to which we have been referred, no election had been held at the date of the presentation of the petition, and, accordingly, there was, at that time, no subject-matter in existence in regard to which the general jurisdiction of this Court could be invoked. In the view which I take of the case it is not necessary to decide whether the 28th April, the day of nomination, or the 27th May, the day on which the election was declared, is to be taken as the day on which the election is held within the meaning of sect. 88, sub-sect. 4, of the Act of 1882. Without deciding this point I shall assume that, at the date when the petition was presented, no election had been held, with the result that the subject-matter of the jurisdiction by the Commissioner had not come into existence.

In this state of facts two questions arise for our consideration—first, had this premature presentation of the petition the effect of nullifying the subsequent proceedings, or was it an irregularity capable of being waived by the parties, either expressly or by way of inference from conduct? Secondly, if capable of being so waived, has the respondent Bolger by his course of action disentitled himself from relying on this irregularity? On the second

branch of this inquiry I do not propose to add anything to the judgment of my Lord, with which I concur.

In considering the former question it is necessary to bear in mind the distinction between the existence in a tribunal of a general jurisdiction in respect of a certain subject-matter, and the exercise of that general jurisdiction in some individual case. Jurisdiction, in the former sense, cannot be given to a tribunal by the consent of the litigants. But when a condition precedent necessary to the invocation of this general jurisdiction is absent in any particular instance, it is competent to the parties to the litigation to deal with the case on the assumption that it is present; and a party who has committed himself to this course of action will not be permitted to rely on its absence in fact.

The cases which have been referred to by my Lord rest upon a recognition of this distinction. In *Oulton* v. *Radcliff* (1) the subject-matter of the action was within the jurisdiction of the Court of Common Pleas at Lancaster. But it was a condition precedent to the exercise of this jurisdiction in any particular case that the defendant should be served with process within the County of Lancashire. It was held that, where there had been a service out of the jurisdiction, the non-compliance with this condition precedent was an irregularity in procedure which was waived by the appearance of the defendant. *Dierken* v. *Philpot* (2) marks the furthest limit to which this principle has been applied. It had been decided by the Court of Appeal (*Hodgson* v. *Bell* (3)) that where the plaintiff in an action for an amount outside the jurisdiction of the County Court desires to abandon the excess in order to have the case remitted, this must be done so that the reduced claim should appear on the writ in the High Court. Here a condition precedent to the exercise by the County Court of jurisdiction in the particular case was absent; but, inasmuch as jurisdiction would have existed if the condition precedent had been fulfilled, and as the parties might have consented to deal with the case as if it had been fulfilled, it was held that the defendant had by his conduct in not appealing from the remitting order disentitled himself to raise the question of want of jurisdiction before the County Court Judge.

(1) L. R. 9 C. P. 189. (2) [1901] 2 K. B. 380. (3) 24 Q. B. D. 525.

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It is contended that although the parties to an ordinary action may by express agreement, or by conduct, waive an irregularity in procedure, even when it relates to a condition precedent to the exercise of jurisdiction, yet that the same principle is not applicable to a petition such as that in the present case, on the ground that it is not an ordinary *lis*, or suit *inter partes*, but a statutory proceeding in which the electors and the public have a recognized position. This is true to a certain extent as regards the petitioner. He is not *dominus litis* to the same extent as the plaintiff in an ordinary action. The interests of the constituency and of the public are recognized and protected by special enactments. A petitioner cannot withdraw his petition *mero motu*. Precautions are taken against withdrawal as the result of a corrupt bargain or consideration. Provision is made for the substitution of another petitioner under certain circumstances, and also for the introduction of another respondent in the place of one who has elected not to contest the petition. The trial of a petition may be proceeded with notwithstanding that the respondent has ceased to fill the office to which he was elected. All these provisions recognize that the public may have an interest in the further prosecution of an inquiry from which the litigants may desire to retire.

The defendant is under no obligation to defend his seat, or uphold the election. He may, without having obtained leave of the Court, give the prescribed notice that he does not intend to oppose the petition, and in the present case one of the respondents has taken this course. It would be strange if a respondent who may admit as against himself the case made by the petition was not competent to waive an irregularity in the procedure by which he is brought before the Court.

The special provisions of the statute to which I have referred are engrafted upon a procedure *inter partes*, and, so far as these provisions do not apply, the statute leaves the petitioner and respondent in the position of ordinary litigants. I am clearly of opinion that the premature presentation of the petition was an irregularity which the petitioner was competent to waive, and that by his conduct throughout the litigation he had disentitled himself to rely on it at the hearing.

A further question has been glanced at in the case stated by

Mr. Commissioner Maxwell, viz., whether the Commissioner to whom an election petition has been referred by this Court could, under any circumstances, entertain the question of the absence of a condition precedent to the exercise of jurisdiction in the particular case before him. The decision of this point may involve the consideration of questions of general application, and as its determination is not necessary in the view which I take of the case, I express no opinion on this part of the case.

KENNY, J. :—

Three points were argued before us, namely, (1) that the day of election could not be regarded as the day of nomination under any circumstances, and, consequently, that the petition was premature and an absolute nullity ; (2) that it was open to the Commissioner to entertain the point; and (3) that it was a point that could not be and was not waived. In the view which the Court takes of the latter questions, it becomes unnecessary to give a decision on the first point; but I confess that, having regard to the very express language of the statutes and rules and the anomalies which would flow from an opposite conclusion, the tendency of my opinion is in favour of the argument that the day of election in the case of an uncontested vacancy is identical with that in the case where there has been a contest and declaration of a poll. However that may be, I consider that it was not open to the Commissioner to consider this question, and, furthermore, that if it were open to him, he was right in holding that he *ought* not to entertain it. Assuming, for the purpose of this branch of the case, that the petition was premature, the respondents might have applied to this Court to stay further proceedings either by writ of prohibition, or by taking the petition off the file, or dismissing it. Instead of doing so, it was assumed by the particular respondent here that in form and as regards time, the petition was correct, and the question of jurisdiction was not raised, nor even thought of, until the moment of trial before the Commissioner on the 29th June. In the meantime the election petition Judges were allowed to proceed in the usual course. They selected a Commissioner from the panel and, in due form, by signed order, appointed him to try the subject-matter of the petition. More-

K. B. Div. 1908.

In re GRANGE-MELLON ELECTION PETITION.

Kenny, J.

over, the respondent, by formal notice, appointed a solicitor to represent him after an order had been made on an application of which he had knowledge, striking out of the petition another respondent. To say the least of it no more inconvenient or expensive course could be adopted than deferring until the trial the raising of the point of jurisdiction. But, in my opinion, the point was not one for the Commissioner. He is appointed to try the facts which are alleged to invalidate the election on the necessary assumption that there was an election. He is nominated by the election petition Judges, and it is no business of his to inquire into the jurisdiction of the latter to appoint him, or, after appointment, into his own jurisdiction. He had a subject-matter to operate on, specifically delegated to him, namely, the propriety of the rejection by the returning officer of the nomination paper offered on behalf of the petitioner. In my judgment his authority was limited to the investigation of the circumstances attending such rejection—on the assumption, which necessarily underlaid the inquiry, that a statutory election had been held. If he questioned his jurisdiction to try the petition because a wrong date was assigned as the date of the election, he would be thereby questioning the right of the election petition Judges to send the petition down to him, and also the right of this Court to make the order striking out the name of one of the respondents. In my opinion this was beyond his competence; and he was right in holding that the objection could not be raised before him.

Having come to this conclusion, I do not propose to discuss at length the, to my mind, somewhat difficult question, whether there was a complete absence of jurisdiction to entertain this petition. If there were such a complete absence of jurisdiction—still assuming for the purposes of argument that the day of election was the 27th May—an objection founded on it would be incapable of waiver. If it were a mere irregularity, it could be waived; and on the facts of this case I would be of opinion that, if waiver was open, there was a clear case of waiver. My difficulty lies in holding that it was a mere irregularity; and I test the position by asking, what would this Court have done if they had before them, on a date anterior to the 27th May, an application to stay proceedings? We would be embarrassed, it seems to me, by having to deal with

a prospective election, and not with one which had actually taken place. What could the Court have done on such an application? It could not amend by the insertion of a future date; and it would scarcely be right to deliberately allow the petition to stand over until after the technical election day. The Court might have said, "This is no mere irregularity; this objection goes to the very root of the petition: we shall not allow the latter to proceed, and the petitioner will sustain no injury, inasmuch as he can present a new petition when the election day has passed." On the other hand, it is clear that, after the 27th May, such an application as that which I have mentioned would come before the Court under wholly different conditions from those applicable to it before that date. In view of the circumstance that the "election" had taken place, it might with great force be contended that the petition was capable of amendment and was no longer a nullity. If that were a correct view, it would follow that if a respondent lay by after the 27th May and took no step to question the validity of the petition, it ought to be assumed against him that—the question of the election day being a very controversial one—he by his inaction had assented to the day being regarded, under the circumstances, as the 28th April, and not the 27th May, and that by his conduct he had waived the technical objection.

It seems to me that the point presents serious difficulties, and I desire to guard myself against pronouncing a definite opinion on it.

I agree that the question put to us in the special case ought to be answered in the negative.

J. L.

Appeal. Dec. 2, 3.

The respondent Bolger appealed to the Court of Appeal (THE LORD CHANCELLOR and FITZ GIBBON and HOLMES, L.JJ.).

M'Grath, for the respondent (appellant).

James O'Connor, *K.C.*, and *Alfred Coffey*, for the petitioner.

Dec. 3.

The Court of Appeal affirmed the judgment of the King's Bench Division.

Solicitor for the respondent Bolger: *P. J. Byrne.*

Solicitor for the petitioner: *T. F. Mark.*

R. ST. J. C.

K. B. Div. 1908.

HAMILL AND ANOTHER *v.* M'DONNELL (1).

Oct. 26.

Practice—Motion for final judgment—Action for the recovery of land—Notice to quit—Specially indorsed writ—Claim for possession and arrears of rent—R. S. C., I. (1905, 22*nd February*), *Ord. III., Rule* 6; *Ord. XIV., Rule* 1.

In an action for the recovery of land by a landlord against a tenant whose term has been duly determined by notice to quit, where the writ is specially indorsed, under Order III., Rule 6, with a claim for possession and for arrears of rent up to the expiration of the notice to quit, if, on a motion for final judgment for possession and for the arrears of rent, the plaintiff shows that he is entitled, he should be given leave to mark final judgment for both.

MOTION on behalf of the plaintiffs for final judgment.

The action was brought by Hannah Hamill and Teresa Hamill against Andrew M'Donnell, to recover possession of certain premises, and for arrears of rent, under a contract of tenancy by which the premises were let by the plaintiffs to the defendant. The writ was indorsed as follows:—

"The plaintiffs' claim is for possession of the house and premises situate at 76, Mill Street, in the parish of Shankill, barony of Belfast, and county of the city of Belfast, which was, by agreement in writing of the 16th day of January, 1907, let by the plaintiffs to the defendant for the term of one year certain, from the 1st day of February, 1907, and thereafter as a monthly tenancy, which said tenancy was duly determined by notice to quit expiring on the 1st day of September, 1908. The plaintiffs also claim the sum of £20 8*s.* 4*d.*, amount of rent due by the defendant to the plaintiffs up to and ending the 1st day of September, 1908, in respect of the premises hereinbefore mentioned."

The particulars specified the amount of the monthly rent and the date on which each gale became due.

(1) Before PALLES, C.B., and ANDREWS, BOYD, and WRIGHT, JJ.

An affidavit was made by the plaintiffs' agent, which contained, *inter alia*, the following statement:—"The defendant, since the issue of the writ herein, has paid me the sum of £5 16*s.* 8*d.* on account of rent, leaving a balance due for rent of £14 11*s.* 8*d.* Said payment on account was accepted by me without prejudice to the plaintiffs' right." The affidavit also stated that the balance of £14 11*s.* 8*d.* was still due, and that the defendant was still in possession of the premises.

The writ was served on the defendant on September 16th, 1908, and an appearance thereto was entered on September 29th, 1908.

The motion for judgment first came before Palles, C.B., sitting as Vacation Judge, on October 20th, 1908. On being informed by the Registrar that the practice in such cases was to make an order for possession only, and not to give judgment for arrears of rent, the Lord Chief Baron adjourned the motion, in order that it should be considered by a full Court.

Macrory, for the plaintiffs:—

I ask for judgment both for possession and for the arrears of rent. In actions for the recovery of land against a tenant whose term has been determined by notice to quit, the writ may be specially indorsed with a claim for rent as well as for possession: Order III., Rule 6 (F). Under Order XIV., Rule 1 (*a*), liberty may be given to enter final judgment "for the recovery of the land (with or without rent or mesne profits)." It is true that there is no form for such a judgment given in the appendices to the R. S. C., I. (February 22nd, 1905), but the forms do not control the Rules: see note to the appendices (Wylie, p. 1217).

The English practice is settled by *Southport Tramways Co.* v. *Gandy* (1). In that case the Court of Appeal affirmed the decision of Kennedy, J., granting final judgment for possession, "and for mesne profits to be calculated up to the date of the plaintiff obtaining possession."

The defendant did not appear on the hearing of the motion.

(1) [1897] 2 Q. B. 66.

K. B. Div. 1908.

HAMILL v. M'DONNELL.

PALLES, C.B. :—

This case has been extremely well argued by Mr. Macrory, and he has satisfied us that the judgment to which the plaintiffs are entitled is one for recovery, not only of possession of the lands, but also for the arrears of rent claimed.

The actions within Order III., Rule 6 (which authorizes a special indorsement of the writ), include those for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or been duly determined by notice to quit, and actions for non-payment of rent, with or without a claim for rent. In such actions the writ may be indorsed with a statement of the plaintiff's claim or of the remedy or relief to which he claims to be entitled.

The words of Order XIV., Rule 1 (*a*), include those actions. "The plaintiff may . . . apply for liberty to enter final judgment for the amount so indorsed, or for the recovery of the land (*with* or without *rent* or mesne profits), as the case may be ; and in the case of actions for the recovery of land for non-payment of rent, to ascertain the amount of rent due."

The latter words—"to ascertain the amount of rent"—it will be observed, do not, *per se*, authorize judgment for possession. This is authorized by the preceding words. The ascertainment of the amount of rent due is an additional provision to comply with the statutory provisions of the Landlord and Tenant Code, which makes this ascertainment material in respect of redemption.

Therefore the words, "final judgment . . . for recovery of land (*with* or without rent or mesne profits)," cannot be confined to actions founded upon the expiration or determination of the term, but must include those for recovery of land for non-payment of rent; and therefore, in such an action the judgment may be as well for the rent, if claimed, as for the possession. The difficulty is that Order III., Rule 6, directs the special indorsement to be *to the effect* of such of the forms in Appendix C, Section IV., as shall be applicable to the case, and in the only form so applicable here (viz., No. 2, Section VII.), the claim is limited to the possession.

But the earlier Order (Order III., Rule 6) *expressly* authorizes a claim for rent, and the later one (Order XIV., Rule 1), in terms

equally express, provides for judgment for the rent as well as for the possession; and we think it is impossible to allow this omission from the form to countervail such express provisions of the Rules.

I was therefore of opinion, when the motion was moved before me in vacation, that the plaintiffs' contention was right. As, however, our experienced Registrar, Mr. Yeo, informed me that the practice was uniform not to give liberty to mark such a judgment, I allowed the motion to stand until to-day, that the decision of a Divisional Court might be obtained on the question. We have all now carefully considered the question, and we hold that the judgment should be for the rent (as claimed) as well as for the possession.

For myself, I am of opinion that the practice referred to had its origin in former rules of Court, now revoked, which rules did not authorize such a judgment. I am not myself aware of any case in which the attention of the Judge was called to the distinction between these former rules and those now in force; but under any circumstances, a practice which cannot have prevailed for more than three years (the period during which our present rules have been in operation) is well open to review.

ANDREWS, BOYD, and WRIGHT, JJ., concurred.

The curial part of the order was as follows:—

"IT IS ORDERED that the plaintiffs be at liberty to sign final judgment for the sum of £14 11*s.* 8*d.* (being the balance of the amount indorsed on the writ of summons), and also for recovery of the possession of the house and premises mentioned in the indorsement upon the said writ, with their costs of suit, and also £4 4*s.* for the costs of this motion."

Solicitor for the plaintiffs: *Charles G. Jefferson.*

J. C. W.

Appeal. 1908. Nov. 24.

IN RE WORKMEN'S COMPENSATION ACT, 1906; ELIZABETH JOHNSTON, WIDOW, AND JOHN JOHNSTON AND ANNE JOHNSTON, APPLICANTS; THE MONASTEREVAN GENERAL STORE CO., RESPONDENTS (1).

Workmen's Compensation Act, 1906—"*Employed otherwise than for the purposes of the employers' trade or business*"—*House exclusively used and occupied for business—Repairs to roof.*

A labourer was employed to assist in repairing the roof of a house in which drapery, grocery, and hardware business was carried on by the employers. The employment was casual. The assistants in the business occupied the dwelling part of the house over the shop. It was the duty of the manageress to have the premises in proper condition for carrying on the business. While engaged in repairs to the roof the labourer met with the accident which caused his death:—

Held, that at the time of his death he was employed for the purposes of the employers' business, and that his dependants were entitled to compensation under the Workmen's Compensation Act, 1906.

APPEAL by the Monasterevan General Store Company from the decision of His Honour Judge Brereton Barry, holding that the applicants, as dependants, were entitled to compensation, which he assessed at £150, for the death of Patrick Johnston.

The learned Judge's report of the case was as follows:—

"Elizabeth Johnston, widow, examined said:—'I lived at Monasterevan; accident happened on the 16th May, 1908; I and my two children, and five of my stepchildren, children of the deceased, all lived together. He was a labourer. He was killed by falling from a ladder on the 16th May; he was mending the slates.

"Frances Scott, manageress, examined said:—'I remember Saturday, 16th May. Drapery, grocery, and hardware is the business of the Company. The Company own the house. They

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

have acquired it in fee-simple. There were some slates off the roof. I had employed White, a slater, to repair the roof; the slater put up a long ladder to the wall, and on the top he placed a short ladder, and then tied it to the long one. At 12 o'clock White said to me that it would be better to get a man to assist him. I sent the yard-man to get some man at the corner. Johnston came in; I asked him how much would he want for the remainder of the day. He said 2*s.*, and I agreed and he went. The next I heard was about 3 o'clock, and I then heard that he had fallen and was killed. I merely employed him for the half-day.' (Cross-examined:) 'It was my duty to have the premises in proper condition for the carrying on of the business.' (To me:) 'The assistants live in the dwelling part of the house; it is over the shop.'

"Mr. Gibson, for respondents, requires me to note the following questions of law, viz.—That the said Patrick Johnston at the time of his death was a person whose employment was of a casual nature, and who was employed otherwise than for the purposes of the employers' trade or business.

"On (1) I hold as a fact that his employment was of a casual nature; (2), I hold as a fact that it was for the purposes of the employers' trade or business, and not otherwise, that he was so employed. If there is no evidence to support such latter finding, the application should be dismissed."

The learned Judge assessed the amount of compensation at £150.

W. G. Gibson (with him *W. Martin M'Grath, K.C.*), for the appellants:—

The deceased's employment on the occasion of the accident being admittedly casual, the question arises whether he was employed for the purposes of the employers' trade or business. The meaning of the word "business" was considered by Sir George Jessel, M.R., in *Smith* v. *Anderson*(1). Citing the Imperial Dictionary, he says: "'Business, employment: that which occupies the time and attention and labour of men, for the purpose of

(1) 15 Ch. D. 247, at p. 258.

Appeal. 1908.

JOHNSTON v. MONASTEREVAN GENERAL STORE CO.

profit or improvement.' That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business." The word as used in section 13 of the Act of 1906 must mean something that is done in connexion with the employment for profit. *Wrigley* v. *Bagley* (1) was a decision on section 4 of the Act of 1897, which excluded, *inter alia*, employment "which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on." The employment there was putting a new driving-wheel into an engine in a cotton factory. It was held by the Court of Appeal, A. L. Smith, M.R., and Collins and Romer, L.JJ., that the work was merely ancillary to, as distinguished from being part of, the business. Again, in *Pearce* v. *London & South-Western Railway Company* (2), also a decision of the Court of Appeal, the erection of a railway station was held to be merely ancillary or incidental to the business of the Railway Company. *Dempster* v. *Hunter & Sons* (3), a note of which appears in the Weekly Notes, 1903, p. 163, closely resembles the present case. There the work of cleaning the windows of a tailor's shop was held to be excluded under the Act of 1897. There is no authority on the words in section 13 of the Act of 1906. Take the case of a law student residing in a house where a casual workman was employed to repair the roof. He could not be held liable for an accident in the course of that employment, for he carries on no trade or business. It was not the intention of the Act to put the business man in a worse position than people who carry on no trade or business.

D. J. O'Brien (with him *James O'Connor*, *K.C.*), for the applicants:—

Section 13 of the Act of 1906 greatly widened the class of workmen entitled to compensation from what it was under the Act of 1897. The question of whether a particular kind of work is done for the purpose of the employer's trade or business

(1) [1901] 1 K. B. 780. (2) [1900] 2 Q. B. 100.
(3) 4 Fraser, Court of Sessions Cases, 5th series, pp. 580–582.

is really one of fact, and the evidence before the County Court Judge was sufficient and cogent for the purpose.

THE LORD CHANCELLOR :—

We are all of opinion that the deceased was, at the time of the accident which caused his death, employed for the purposes of the Company's business, within the meaning of the section of the Act of 1906. The language of the Act of 1897 was quite different; and the decision quoted of *Wrigley* v. *Bagley* (1) is of importance, as illustrating a decision on different language. The Act of 1897 provided that the section should not apply when the work was "merely ancillary or incidental to, and was no part or process in the trade or business." Consequently it was held that a workman engaged in repairing the driving-wheel of an engine used in a cotton-spinning factory was not employed within the meaning of the Act. I think that, if the question were to arise on the Act of 1906, it could not be held that repairing the driving-wheel was not an employment for the purpose of the trade or business carried on in the factory.

It is of great importance in this case that the house was solely used for the purposes of the trade or business carried on therein, the upper story being devoted to the accommodation of the manageress and the assistants who worked in the shop. The manageress, representing the trade, says that it was her duty to see that the premises were kept in proper repair, and that it was in discharge of her duty to the trade she employed the deceased for this work.

The business could not have been carried on unless there was a roof over the premises. There were some slates off the roof. The manageress employed a slater to replace them. He required an assistant, and she employed the deceased man for that purpose. It is impossible, I think, to say that he was not employed for the purposes of the trade or business. He certainly would have been if the whole roof was out of repair. Can it be said that he ceased to be so employed, because some slates only were to be put on? Whether the repairs were to be done to part

(1) [1901] 1 K. B. 780.

Appeal. 1908.

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of the roof or the entire roof, is merely a question of degree. Mr. Gibson had logically to admit that his argument went to the extent that if the whole roof were blown off, the renewing of it would not be work done for the purposes of the trade or business. The question really is one of fact. I think the applicant was entitled to compensation.

FITZ GIBBON, L.J.:—

I think it material to observe the definitions of "employer" and "workman" in the Act of 1906, sect. 13.

> "'Employer' includes any body of persons, corporate or unincorporate, and the legal personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person;
>
> "'Workman' does not include" (*i.e.*, it excludes) "any person employed otherwise than by way of manual labour whose remuneration exceeds £250 a year, or a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business, . . . or an out-worker . . . ." These are all words of exclusion: "but, save as aforesaid, means any person who has entered into, or works under, a contract of service or apprenticeship with an employer," &c.

This is an inverted definition, putting the exceptions first, and the affirmative words at the end; by implication, every person whose employment is of a casual nature is included, if he is "employed for the purposes of the employer's trade or business."

The question is, whether there was any evidence that this person was employed for the purposes of his employer's trade or business. He was engaged by the manageress, whose duty it was to carry on the employer's business, and to see that the premises in which it was carried on were kept in proper condition for that purpose. She says that it was her duty to do so. She employed the workman to do necessary work upon the premises which were exclusively used for business purposes; and she did so in contemplation of thereby having the employer's business carried on.

This was, in my opinion, an employment within the definition in sect. 13.

The Act of 1906 extended the previous Acts, which it repealed; and authorities on the former Acts are not authorities on the later one.

HOLMES, L.J. :—

We are told that this is a case of first impression, and, like other similar questions arising under the Workmen's Compensation Acts, is one of some difficulty.

In concurring in the judgment of the Court, I have regard to the facts found by the County Court Judge, and I disclaim laying down any general or abstract propositions. There are houses in part of which a trade or business is carried on, and the rest of which is occupied by the owner of the business as a residence for himself and his family. In such cases the question may arise whether repairs of the house are made for the purposes of the trade or business, or for the purposes of the residence. In this case I assume that the Judge has found that the whole building was used for the purposes of the trade and business; and I think there was evidence to support this finding.

Solicitor for the appellants: *P. J. Byrne.*

Solicitors for the respondents: *Toomey & Barber.*

W. G.

Appeal.
1908.

In re MILLS, a Bankrupt (1).

Nov. 18. *Bankruptcy—Landlord's claim to six months' rent—Bankruptcy Act*, 1857, *section* 321—*Bankruptcy Rules, December*, 1899—*Practice.*

The practice of the Court of Bankruptcy which prevailed up to 1899, to pay a landlord six months' rent out of the funds in Court where he has given notice to the assignees of the rent being due, though he has neither distrained nor threatened to distrain, has not been altered, and, being legal and convenient, should be adhered to (*diss.* FitzGibbon, L.J.).

Re M'Quillan (29 Ir. L. T. R. 4) followed.

Appeal by Samuel Sherlock, owner of the houses Nos. 110, 111, and 112, Lower Baggot Street, Dublin, of which the bankrupt was tenant, from an order of Boyd, J., dated the 30th October, 1908, refusing the application of Samuel Sherlock for payment of £108 out of the funds in Court, being half a year's rent due to the said Samuel Sherlock out of the premises up to and ending the 1st April, 1908.

The bankrupt filed a petition for arrangement with his creditors on the 27th April, 1908, and the case was turned into bankruptcy on the 19th June, 1908. Shortly after the adjudication, and in pursuance of an order of the Court, dated the 24th June, the stock on the premises was sold by auction on the 14th July, 1908.

On the 26th June, 1908, the solicitors for the said Samuel Sherlock wrote to the official assignee that, having received instructions, a writ for the rent had been served on Mr. Mills, and asking whether the assignee elected to take the houses or pay the debt and costs.

Mr. M'Entire, the official assignee in the matter, replied as follows:—

(1) Before The Lord Chancellor, and FitzGibbon and Holmes, L.JJ.

"FOUR COURTS, DUBLIN,
"*29th June*, 1908.

"*Re* Benjamin Mills, Bankrupt.

"DEAR SIRS,—I have your letter of the 26th inst., and in reply I beg to say that, pending the appointment of a creditors' assignee, it would not be regular, according to the practice of the Court, for the assignees to elect with regard to the premises in this matter. The sitting for the appointment of the creditors' assignee will come before the Court on the 10th prox.—Yours truly,

"ALEX. KNOX M'ENTIRE,
"*Official Assignee.*

"Messrs. ENNIS, SON, & MACHIN,
"*Solicitors.*"

Mr. Perrin, agent of the owner, wrote to Mr. M'Entire as follows:—

"179, GREAT BRUNSWICK STREET,
"*July 21st*, 1908.

"DEAR SIR,—Kindly let me know when you will be able to let me have payment of the rent due out of the premises in Baggot Street, Lr., and also when you will hand me over possession of the same on behalf of the landlord.—Yours faithfully,

"JOHN W. PERRIN."

Mr. M'Entire replied:—

"FOUR COURTS, DUBLIN,
"*22nd July*, 1908.

"*Re* Benjamin Mills, Bankrupt.

"DEAR SIR,—In reply to your letter of the 21st inst., I do not think, in the circumstances as they exist in this matter, that your client is entitled to payment in full of the rent of the premises, and if you seek to prove a debt to rank for dividend, I shall thank you to let me have proof of debt accordingly.—Yours truly,

"ALEX. KNOX M'ENTIRE,
"*Official Assignee.*

"JOHN W. PERRIN, ESQ."

On the 24th July the assignees were given leave by Boyd, J., to decline the bankrupt's interest in the premises.

Appeal. 1908.

In re MILLS.

Alfred Coffey (with him *Ronan, K.C.*), for the appellant:—

Up to the Rules of December, 1899, it was the invariable practice of the Court of Bankruptcy to allow a landlord six months' rent though he may not have distrained nor threatened to do so: Bankruptcy Act, 1857, sect. 321; *Re M'Quillan* (1); *Re O'Toole* (2); *Re Smith and Healy* (3). There is nothing to be found in the Rules of December, 1899, changing the antecedent practice. The official assignee's letter of the 29th June, 1908, was calculated to put the landlord off his guard; and then, without any further intimation, the goods on the premises are sold.

S. L. Brown, K. C., for the assignees:—

Unless a landlord avails himself of his right to distrain, limited to six months, he has no preferential debt, and must come in *pari passu* with the other creditors. Any practice to the contrary, if it in fact existed, was illegal; and we have the authoritative declaration of Boyd, J., that for the future it should not prevail: *In re Neil Mackenzie* (4); *Ex parte Descharmes* (5); Cherry's Land Acts (ed. 1903), p. 96.

Ronan, K.C., in reply.

THE LORD CHANCELLOR:—

In this case Mills was adjudicated a bankrupt on the 19th June. He owed six months' rent to his landlord; and the question is whether, according to the practice of the Court, he has lost his right to recover it.

The section speaks of distress, but it has been long settled in this country that if the right exists, and the fact of the rent being due is intimated, it is not necessary to make the levy. Judge Miller calls it a salutary practice that when a landlord is in a position to distrain, and whether through respect for the Court, or upon an undertaking by the assignees, forbears, he is paid six months out of the assets: *Re O'Toole* (2).

(1) 29 Ir. L. T. R. 4.
(2) *Ibid.* 6.
(3) 6 Ir. Weekly Reports, 36.
(4) [1899] 2 Q. B. 566.
(5) 1 Atk. 113.

That was applied by this Court in *Re M'Quillan* (1), where we reversed the decision of Judge Boyd. The fact of the rent being due was communicated, and the assignee wrote that he would have the matter brought forward when a fund had come in.

I think it really a question of fact whether in substance the same state of facts did not exist in this case. The landlord had issued a writ on the 15th June for the six months' rent; and on the 26th June his solicitors wrote to the assignees stating the rent was due and asking would the assignees elect to take the lease, which of course would make them liable as assignees of the term. The reply was in effect that they would consider the matter later on. I think the effect of this, though I by no means say the design, was to produce inaction on the landlord's part. On the 9th July the assignee removed the goods which might have been distrained, and on the 14th July sold. On the 22nd July, in reply to a letter of 21st July, he writes that a proof must be lodged.

I think on the facts the old practice of the Court would have applied. The practice was not illegal and it was convenient, but Judge Boyd has decided that the practice has been altered by the rules of 13th December, 1899. It is admitted that the rules made no alteration in terms, and the law seems the same as it was when we decided *M'Quillan's Case* (1). If a landlord shows an intention to abandon his right, the case would be different; but I do not think that occurred here.

On the whole I think the appellant was entitled to be paid six months' rent, and accordingly that the appeal should be allowed.

FITZGIBBON, L. J. :—

I am afraid that this decision is an indulgence to landlords who do nothing, and I can not concur in it. We have no evidence as to the practice of the Bankruptcy Court since 1899. The statement in 6 I. W. R., p. 36, that the decision of Boyd, J., in *Re Smith and Healy* (2) was "under the Bankruptcy Rules of December 13, 1899" is wrong; and there is an inconsistency in the decision itself, for the Judge laid down that in future no landlord would be paid preferentially unless distress was threatened or

(1) 29 Ir. L. T. R. 4. (2) 6 Ir. Weekly Reports, 36.

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levied before the sale by the assignees: yet he ordered the money in Court to be paid to the landlord on account of the rent due.

In Cherry's Land Law Acts (ed. 1903), page 96, the rule laid down by Boyd, J., is stated "as the practice of the Court." In the present case, on reading the correspondence, I find it to be altogether conversant with the question whether the assignees would elect to take the premises or would surrender them; and there is no indication of any threat or intention to distrain on the part of the landlord; nor does it appear that either he or the assignees were thinking of distress. It would be quite a convenient practice if assignees agreed with distraining landlords to pay them, out of the proceeds of sale, the amount which could be levied by distress. But I think that the landlord should be shown to have foregone his right of distress in consideration of such an agreement; and in this case I can find no evidence that the landlord did anything, or forebore from doing anything, which entitled him to a preferential payment. As the practice "for the future" was laid down in *Re Smith and Healy* (1) in 1899, and was published in Cherry in 1903, and is in accordance with the English decisions and with the law, I can not agree to pay the creditors' money to a landlord who did not assert his right of distress in any way until after the assignees had sold the goods.

HOLMES, L.J.:—

A landlord retains his right of distress for rent upon the goods of a bankrupt tenant, subject to the limitation that such right shall not be available for more than six months' rent accrued prior to the filing of the petition. As far as my knowledge of the subject goes back—and that is for a long period—the practice was, that if there were distrainable goods of sufficient value on the premises, the assignees paid the six months' rent on being satisfied that it was due, without either distress or threat of distress. This practice has been recognized by this Court in *Re M'Quillan* (2) and other cases, and, in my opinion, is not illegal. If the goods can be taken from the custody of the assignees, and sold for the purpose of defraying the rent, the assignees would surely be at

(1) 6 Ir. Weekly Reports, 36. (2) 29 Ir. L. T. R. 4.

liberty, without pressure, to make a payment that could be thus enforced; and the long-established practice of the Court was an intimation that they were prepared to act in this way. Nothing happened to interfere with this practice until 1900, when, according to a report, contained in a volume published with what authority I know not, Boyd, J., said that for the future the rent would only be paid if there was a distress, or, at least, threat of a distress. He did not hold the previous practice to be illegal, for in the case before him he ordered the payment to be made; but he gave as the ground of decision new rules that had been made by the Judges a few weeks before, and that those rules rendered necessary a change in practice of the character above mentioned. I find, however, that those rules neither directly nor indirectly relate to the practice in any way; and it seems to me that with the disappearance, or rather non-appearance, of the reason for the change, the old practice ought to continue. It was, as I have said, not illegal, and was more convenient and less likely to cause difficulties than what is suggested in its place. What would amount to a threat of a distress? Would a peremptory demand of the sum due be so construed? It probably would; and if so, there is something like it in the present case; or, if there is not, the landlord was probably prevented from making it by the official assignee's reply to his first letter.

Apart, however, from this, I decide the case on the ground that the old practice ought still to be followed.

Solicitors for the appellant: *Ennis, Son, & Machin.*
Solicitor for the respondent: *R. Davoren.*

W. G.

K. B. Div. 1909.

Jan. 13.

THE MAYOR, ALDERMEN, AND BURGESSES OF LIMERICK *v.* CROMPTON & CO., LIMITED (1).

Practice—Staying proceedings—Action of contract—Agreement to refer matters in dispute to English Court.

A contract made between the Corporation of L., in Ireland, and C. & Co., Ltd., a Company having its registered office in England, and carrying on business there, contained a clause that the contract should "in all respects be construed and operate as an English contract, and in conformity with English law." The contract was made in Ireland, and the works to be done under it were to be erected there. An action for damages for breach of the contract having been instituted in the Irish Court by the Corporation of L. against C. & Co., on a motion by C. & Co. to stay all further proceedings in the action:—

Held, by the King's Bench Division, that, as the parties had agreed to refer all questions arising under the contract to an English tribunal, the action should be stayed.

MOTION to stay the proceedings in the action. The action was brought by the Mayor, Aldermen, and Burgesses of the County Borough of Limerick against Crompton & Co., Limited, a firm of manufacturing engineers, carrying on business in England, and having their head office in London, to recover £1654 16*s.* 3*d.* as penalties for delay and for breach of a contract for the supply of certain electrical plant by the defendant Company to the plaintiffs, the amount claimed for penalties under the contract being £1113 2*s.*, and the residue of the claim being for breach of contract in supplying an engine which was below the power specified in the contract.

The contract, which was in writing, was entered into in Ireland, the acceptance on the part of the plaintiffs being by a letter posted in Limerick on June 7th, 1907. The terms of the contract were subsequently embodied in articles of agreement which were executed in Limerick by the plaintiffs on a date

(1) Before ANDREWS, JOHNSON, and BOYD, JJ.

subsequent to their execution in London by the defendant Company. The works contracted for were to be executed in Limerick. The above-mentioned articles of agreement contained, *inter alia*, the following clauses:—

"Clause 47. If at any time any question, dispute, or difference shall arise between the purchasers or their engineer, and the contractor, upon or in relation to or in connexion with the contract, either party may forthwith give to the other notice in writing of the existence of such question, dispute, or difference, and such question, dispute, or difference shall be referred to the arbitration of a person to be mutually agreed upon; or, failing agreement, to some person appointed by the President for the time being of the Institution of Electrical Engineers. The award shall be final and binding on all parties. Upon every or any such reference, the costs of and incidental to the reference and award respectively shall be in the discretion of the arbitrator, who may determine the amount thereof, or direct the same to be taxed as between solicitor and client, or as between party and party, and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to arbitration, within the meaning of the Arbitration Act, 1889.

"Clause 48. The contract shall in all respects be construed and operate as an English contract, and in conformity with English law; and all payments thereunder shall be made in England and in sterling money."

The remaining clauses are not material for the purpose of this report.

Disputes having arisen in reference to the execution of the contract, the defendant Company required the plaintiffs to refer the matters in dispute to arbitration, but after some correspondence the plaintiffs refused to do so; and on November 17th, 1908, the plaintiffs obtained an order in the King's Bench Division giving them liberty to issue the writ of summons in the action against the defendant Company for service on the defendant Company at their registered office in England.

The writ was subsequently served, and the defendant Company thereupon moved in the King's Bench Division for an order

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that the order of November 17th, 1908, should be discharged, and the writ of summons in the action and the service thereof set aside, on the ground that it was a term of the contract, for the breach of which damages were claimed, that the same should be enforceable in England, and not elsewhere; and that an action in respect of such breaches of contract could be more conveniently tried in England; or, in the alternative, for an order that further proceedings in the action should be stayed pursuant to sect. 14 of the Common Law Procedure Amendment Act (Ireland), 1856, pending a reference to arbitration of the matters in dispute.

G. FitzGibbon, K.C. (*Poole* with him), for the defendant Company:—

The contract upon which this action is brought contains an express stipulation that it "shall be construed and operate as an English contract, and in conformity with English law." I contend that the contract should operate as if it had been made in England; and, therefore, the order giving leave to issue the writ for service out of the jurisdiction should be set aside: Ord. XI., R. 1 (*c*). As to the meaning of the expression "English contract," see *Spurrier* v. *La Cloche* (1), at p. 450.

The action should be stayed on the ground that the parties have agreed to refer all matters in dispute to another tribunal: *Law* v. *Garrett* (2); *Nash* v. *Fischer* (3). The latter case was an action brought to recover damages for breach of a contract made in Milan, to insure a motor car which was to be sent from Milan to Dublin. The contract contained the following clause:—"The judicial question shall be submitted to the forum of Milan" (4): and the Court of Appeal stayed the action (5).

The reference in the contract to the Arbitration Act of 1889, a purely English statute, supports the view that the parties contemplated an English forum for the decision of all questions

(1) [1902] A. C. 446.

(2) 8 Ch. D. 26.

(3) C. A., May 11, 1908.

(4) "La contestazione giudiziano suranno sottoposto al foro di Milano," in the original.—[REP.]

(5) On this point see also *Kirchner* v. *Gruban*, Weekly Notes, Jan. 16, 1909, p. 12.—[REP.]

arising upon the contract. That Act differs in important matters from the Common Law Procedure (Ireland) Act, 1856; and this Court cannot exercise under the latter statute the jurisdiction possessed by the English Courts under the former.

[He also argued that the action should be stayed pending a reference of the matter in dispute to arbitration under the provisions of clause 47 of the contract; but as the judgment did not proceed upon this ground, it is unnecessary to report the arguments upon this point.]

C. Doyle, K.C. (*Paul Gleeson* with him), for the plaintiffs:—

This contract was made in Ireland, it was to be performed in Ireland, and it was broken in Ireland. The case is within Ord. XI., R. 1. The present defendants could not bring an action in England upon this contract: *British Wagon Co., Limited*, v. *Gray* (1). The obligation to sue in England should be mutual, and not one-sided. I contend that clause 48 means only that the law to be applied in construing the contract shall be English law. Nothing is said as to the tribunal by whom it is to be applied; and in regard to the law of contract there is no distinction between the law of England and that of Ireland. Clause 48 does not exclude the jurisdiction of the Courts of this country: *Hœrler and Another* (*trading as C. F. Mumm*) v. *Hanover Caoutchouc, Gutta Percha, and Telegraph Works* (2).

[He also cited *Montgomery, Jones, & Co.* v. *Liebenthal & Co.* (3).]

G. FitzGibbon, K.C., in reply.

ANDREWS, J.:—

This case has been so elaborately argued by counsel on both sides that we do not consider it necessary to reserve judgment.

The application is two-fold—(1) to set aside the order giving leave to issue the writ in the action, and serve it out of the jurisdiction, or (2) that all further proceedings in the action shall be stayed, under section 14 of the Common Law Procedure Amendment Act

(1) [1896] 1 Q. B. 35. (2) 10 T. L. R. 22. (3) [1898] 1 Q. B. 487.

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(Ireland), 1856, pending the result of an arbitration, in accordance with the terms of the contract between the parties.

Upon this alternative part of the application it is not necessary to give any decision, as our judgment is based upon the construction of clause 48 of the contract between the parties. This clause is quite general in its terms—nothing could be wider. It is as follows:—"The contract shall in all respects be construed and operate as an English contract, and in conformity with English law, and all payments thereunder shall be made in England, and in sterling money." Mr. FitzGibbon relies on both these provisions, viz., that the contract shall be construed and operate as an English contract, and in conformity with English law.

To "operate as an English contract" means to take effect as an English contract; and if the contract is in all respects to take effect as an English contract, it must have all the incidents of such a contract, and must therefore, in our opinion, be treated as a contract made in England.

Under this contract the English jurisdiction is, in our opinion, exclusive, and an English Court is, in effect, the *forum* agreed on for the judicial determination of all questions arising in relation to it. The contract is not framed to oust the jurisdiction of the Courts of this country. It is a contract by which the parties (as we construe it) have, in effect, agreed to have recourse to an English tribunal only. In the recent case of *Nash* v. *Fischer* (1) (as yet unreported) such a contract was considered by the Court of Appeal to be a valid one.

JOHNSON and BOYD, JJ., concurred.

The following order was made:—

"IT IS ORDERED that the order obtained by the plaintiffs on the 17th day of November, 1908, and the writ of summons in pursuance thereof, be set aside, and that the plaintiffs do pay to the defendants the costs of this motion, when taxed."

Solicitor for the plaintiffs: *John Dundon.*

Solicitors for the defendant Company: *Boodles & French.*

J. C. W.

(1) C. A., May 11, 1908.

IN THE MATTER OF THE LOCAL GOVERNMENT (IRELAND) ACT, 1898, AND IN THE MATTER OF A CLAIM FOR COMPENSATION FOR MALICIOUS INJURIES; FREDERICK OLIVER, BARON ASHTOWN, APPLICANT; THE COUNTY COUNCIL OF WATERFORD, AND THE CLONMEL RURAL DISTRICT COUNCIL (No. 2), RESPONDENTS (1).

Appeal. 1908. Dec. 7.

Malicious injury—Game cover—Incorporeal hereditament—Injury to—Compensation—Local Government (Ireland) Act, 1898, *sect.* 5—*Malicious Damage Act*, 1861, *sect.* 16—*Grand Jury (Ireland) Act*, 1836, *sect.* 137.

Lands were demised for a term of years, under a lease which reserved to the lessor, and his heirs and assigns, all game on the lands, and the right to enter upon the lands to search for, kill, and carry away game. During the continuance of the lease a quantity of heather and grass upon the demised lands, forming a game cover, was maliciously burned, but not so as to injure the leasehold reversion. On an application for compensation by the owner of the reversion, under section 5 of the Local Government (Ireland) Act, 1898 :—

Held, that the applicant was not entitled to compensation in respect of the injury to his incorporeal right.

THIS was a Case Stated by way of appeal by the Right Honourable the Lord Chief Justice of Ireland, as follows :—

1. This case came before me at the Summer Assizes for the county Waterford on an appeal from the order of the County Court Judge of Waterford, whereby he awarded £11 compensation for malicious injury to the applicant.

2. By his notice of application for compensation, after reciting that some person or persons on the afternoon of Monday, the 20th day of April, 1908, on the lands of Knockalisheen, in the county district of Clonmel (No. 2), and in the county of Waterford, did wantonly and maliciously set on fire and wholly destroy the heather and grass, which is a game cover and in which grouse are hatched and reared, together with part of the turfy substance,

(1) Before PALLES, C.B., and FITZGIBBON and HOLMES, L.JJ.

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on about 18 statute acres of the said lands of Knockalisheen, now in the occupation of Patrick Coffey, and reciting that the said heather and grass was the property of the applicant, notice was duly given that application would be made to the County Court Judge for compensation for the loss sustained by the applicant.

3. On the hearing of the said application the County Court Judge awarded to the applicant £11 compensation.

4. An appeal was taken by the Clonmel Rural District Council (No. 2) against the said award, dated the 11th day of June, 1908.

5. The evidence produced on behalf of the applicant was as follows :—By lease dated the 12th July, 1855, and made between Richard English and John Christopher English of the one part, and Thomas Coffey of the other part, the lessors granted and demised to the lessee All that and those that part of the lands of Touragariffe, with the mountain thereunto belonging, with full liberty to the lessees to cut turf and heath thereon, and make sale thereof for the term of 200 years, at the yearly rent of £36, reserving and excepting out of the demise to the lessors, and their heirs and assigns, all game whatsoever, with the full, free, sole, and exclusive right at all times to enter upon and search for, kill, and carry away the same. The lessors' interest in the said lease is now vested in the applicant, and the lessee's interest in Patrick Coffey. (*a*) The lands of Knockalisheen are a portion of the said lands comprised in the said lease. (*b*) James Graham proved that for some time past there was great ill-feeling in the neighbourhood against the applicant on account of prosecutions instituted by him for interference with his game rights. That on the 20th April, 1908, the heather and turf on the said lands was set on fire, and that the premises were set fire to in three separate and distinct places. He alleged that the portion burnt was some of the best portion of the mountain for rearing grouse, and for providing cover for shooting purposes, and that about 12 acres of the heather was destroyed, and would seriously interfere with the use of the remaining portion of the mountain for shooting purposes for about the next seven years. He calculated the loss at £1 per acre of the heather burned. He was corroborated by

other witnesses as to the quantity of heather burned, and as to origination of the fire in separate places.

6. On behalf of the respondents evidence was given to show that the burning was not wanton or malicious.

7. It was contended on behalf of the respondents that in any event (*a*) having regard to the terms of the lease and the evidence no injury had been done to the applicant's reversion in the demised premises; (*b*) applicant had no property in the grass and heather which had been burned; that they were the property of Patrick Coffey, the assignee of the leasehold interest under the lease aforesaid; (*c*) that the applicant was only entitled to game rights over the demised premises, and admitting these rights to have been interfered with by the burning in question they were merely an incorporeal hereditament, which was not real or personal property within the Malicious Damage Act, 1861, and, therefore, not the subject of compensation for criminal injury under sect. 5 of the Local Government Act, 1898.

8. On behalf of the applicant it was contended that (1) the burning was malicious; (2) that there was sufficient property in the applicant to support the claim; (3) that the burning was intentionally done during a period prohibited by law, and that the applicant was therefore entitled to compensation for the damage sustained by him.

The following cases were cited to me:—*Harding* v. *Justices of Cork* (1); *Hughington* v. *Baltinglass District Council* (2); *Tyrone County Council* v. *Trustees of Ogilvey* (3); *Massy* v. *Cork County Council* (4); *Laws* v. *Eltringham* (5).

9. I find—(1) That the burning on the 20th April, 1908, was malicious. (2) That game rights of the applicant over the said lands were deteriorated to the amount of £11, but there was no injury to the applicant's reversion in the demised premises.

10. My view was that the applicant was not entitled to recover on these grounds—(*a*) That injury to a mere right to shoot game was not a subject of compensation within the meaning of the relevant statutes; (*b*) That having regard to the term created

(1) 35 I. L. T. & S. J. 515.
(2) 35 I. L. T. R. 204.
(3) *Ibid.* 242.
(4) 1 New Ir. Jur. Rep. 284.
(5) 8 Q. B. D. 283.

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by the lease, and to the fact that all damage, so far as it related to the herbage, heather, and game cover, would be repaired in about seven years, there was no injury to the reversion; (*c*) That injury to a right, if such existed, to have heather preserved as a cover for game, was not a subject-matter for compensation within the meaning of the relevant statutes. As the matters involved were of general importance, I said I would state a case: both parties concurred, and I accordingly state this case.

11. The lease of 12th July, 1855, and all other documents referred to in the preceding statement are to be regarded as incorporated herewith.

12. The question for the opinion of the Court is—Is the applicant entitled to recover damages, having regard to the provisions and reservations, and exceptions contained in the lease dated 12th July, 1855, and all the circumstances of the case?

O'BRIEN, L.C.J.

H. D. Conner, K.C., and *De Renzy*, for the applicant:—

We contend that the applicant is entitled to compensation under sect. 135 of the Grand Jury (Ireland) Act, 1836, as extended by sect. 5 of the Local Government (Ireland) Act, 1898, he having been injured by a malicious act causing damage, which act was a crime punishable on indictment under sect. 16 of the Malicious Damage Act, 1861. Sect. 135 of the Grand Jury Act, 1836, does not prescribe that the applicant for compensation must be the owner of the property destroyed: it is the person or persons injured by the malicious act who are to be compensated in respect of the injury sustained by him or them. The applicant's right in the property destroyed was a *profit a prendre* (*Fitzgerald* v. *Firbank* (1)), and he therefore has a sufficient interest to maintain this application: *Hughington* v. *The District Council of Baltinglass* (2); *Re Earl of Kenmare's Presentment* (3). That game rights can be the proper subject-matter of compensation is shown by *Tyrone County Council* v. *Trustees of Ogilvy* (4); *Laws* v. *Eltringham* (5) only decided that the herbage right there in ques-

(1) [1897] 2 Ch. 96.
(2) 35 I. L. T. R. 204.
(3) 26 I. L. T. R. 93.
(4) 35 I. L. T. R. 242.
(5) 8 Q. B. D. 283.

tion was not real or personal property within sect. 52 of the Malicious Injuries to Property Act, 1861, which statute was always most strictly construed by the Courts: *Gardner* v. *Mansbridge* (1).

[*Gayford* v. *Chouler* (2) was also referred to.]

Carrigan, for the respondents:—

The case stated finds as a fact that the appellant's reversion in the demised premises has not been injured, and the claim is, accordingly, unsustainable. His right in the property destroyed is a mere incorporeal right, which does not come within sect. 135 of the Grand Jury Act, 1836, as extended by the Local Government Act of 1898. *Laws* v. *Eltringham* (3) governs this case. No doubt the applicant may have been injured by the malicious act, but that is not enough; sect. 137 of the Grand Jury (Ireland) Act, 1836, shows that the person to make the examination upon oath which is a condition precedent to obtaining compensation, must be the owner of the physical property itself for the injury to which compensation is claimed: *Commercial Plate Glass Co.* v. *Lord Mayor, Aldermen, and Citizens of Belfast* (4). In *Massey* v. *The County Council of Cork* (5) a claim similar to the present was dismissed by Lord O'Brien, L.C.J.

[He referred to *Reg.* v. *Kirby* (6).]

Conner, in reply.

PALLES, C.B.:—

The question upon this appeal is whether the applicant, who was entitled to a right to shoot over a certain bog, but had no property in the soil, is entitled to compensation for the malicious burning of the furze and underwood growing upon it, whereby his incorporeal right was deteriorated in value. The Lord Chief Justice held that he was not, and in that conclusion I entirely concur.

The subject-matter within sect. 135 of 6 & 7 Wm. 4, c. 116, in respect of the malicious destruction of which an application for compensation may be made as extended by sect. 5 of the Local

(1) 19 Q. B. D. 217.
(2) [1898] 1 Q. B. 316.
(3) 8 Q. B. D. 283.
(4) 27 I. L. T. R. 116.
(5) 1 New Ir. Jur. 284.
(6) 31 I. L. T. R. 46.

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Government Act, 1898, includes the furze and underwood in question; and by that section the persons entitled to apply for compensation are described as "any person *injured* by any such offence." In a sense the applicant here was *injured* by the offence, as his right was injuriously affected; and, were the interpretation of this section unaffected by any other section, the applicant's claim could be sustained. Section 137, however, of the same Act enacts that "*every* person or persons who shall, under the provisions of this Act, apply for compensation . . . shall . . . give in his or their examination upon oath, or that examination upon oath shall be given by his, her, or their servant or servants, *who had the care* of his, her, or their property so injured, before some Justice of the Peace," &c., specifying, *inter alia*, whether they know the persons who committed the injury. This examination plainly is, and has always been held to be, a condition precedent to the right to recover compensation; consequently it *expressly* limits the right to apply for compensation to owners of the *property* injured (that is to the owners of the physical things burned or destroyed or injured), and excludes those who have no more than incorporeal rights in, or mere charges upon, that property.

This, as I understand it, is the ground of the judgment of Andrews, J., in *Commercial Plate Glass Co.* v. *Lord Mayor, Aldermen, and Citizens of Belfast* (1), and in that judgment I concur.

It is now upwards of seventy years since the Act of Wm. 4 was passed, and during that long period such a claim as this was never held to be sustainable. Indeed, until the *Belfast Case* (1) I have mentioned I do not believe that it was ever made. The reason of this I believe to be the above limitation of the persons entitled to apply.

It is quite another thing whether a person such as an insurer who is entitled by subrogation or otherwise to stand in the place of, and use the name of, the owner, may not claim in his name, the examination on oath being by the owner's servant. I remember an insurance company who had paid the owner of a mansion house which had been maliciously burned a large amount under their policy for the damage caused by a fire, successfully prosecuting,

(1) 27 Ir. L. T. R. 116.

some fifty years ago, before Monahan, C.J., at the Meath Assizes, in the case of a Mr. Thompson of Rathnally, a claim theretofore made by the owner; but there the application, although made at the Assizes by the insurance company, was in the name of the owner, and the examination on oath was by his servant.

In my opinion the claim is unsustainable.

FITZ GIBBON, L.J.:—

I understood Mr. Conner, in opening this appeal to admit, or at least to express the opinion, that under the Grand Jury Act he would not have been in as good a position as that which he claimed to hold under the existing law.

I am, however, of opinion that the Malicious Injuries Act is not material for our present purpose, because though criminality under that Act is now the test of the right of compensation, the definition of the "property" for which compensation may be given has not been altered. Whether or not certain things, *e.g.*, animals *feræ naturæ*, or seaweed, can be the subjects of larceny, has given occasion for legal decision; and here the question is, whether an incorporeal right to pursue game is "property" within the meaning of the Grand Jury Act.

The Lord Chief Baron has referred to the procedure under sect. 137, as indicating that it is inapplicable to incorporeal property, and that such property only as is tangible, and capable of physical injury or destruction, comes within its terms. I think also that the long period—now seventy-two years—during which no such claim as this has been put forward, cannot be left out of consideration, though I do not rely upon it as a "contemporaneous exposition" of the statute. It might have been, but it was not enacted, that any injury which could be made the subject of an action against the wrong-doer for damages should also, when malicious, be made the subject of compensation to be paid by the community: or, possibly, the actionable character of the injury might have been judicially established as the test, but the conclusion that sect. 135 does not apply to intangible property, or to incorporeal rights of the kind here in question, is not only indicated by long usage, but it is supported by the judgments of Andrews, J., and of the Lord Chief Justice himself, to which we

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have been referred, and which I accept as specimens of the acknowledged course of judicial opinion since 1836.

HOLMES, L.J., concurred.

Solicitors for the applicant: *Richardson & Synnott.*
Solicitors for the respondents: *Richard Molony.*

R. ST. J. C.

K. B. Div. 1908.

Nov. 5, 20. Dec. 1, 21.

THE KING (AT THE PROSECUTION OF JAMES JOSEPH DUGGAN) *v.* THE COUNTY COURT JUDGE AND CHAIRMAN OF QUARTER SESSIONS OF FERMANAGH (1).

Licensing Acts—Surrender of interest in licensed premises by lessee—Letting to another tenant—Ad interim *order made at Petty Sessions—Transfer refused at Quarter Sessions on the ground that new tenant had no interest in the license—"Transfer of license," meaning of*—6 *Geo.* 4, *c.* 81, *s.* 21—18 *&* 19 *Vict. c.* 114, *s.* 1—37 *&* 38 *Vict. c.* 69, *s.* 12.

On the 12th June, 1902, M. M. & Co. made a lease to M. for fifty years of a licensed house and premises, and M. having continued to occupy the same in the meantime as a licensed publican, obtained, at the licensing sessions of October, 1907, a certificate entitling her to receive a publican's license, in pursuance of which she took out in her own name a license for the premises from the 10th October, 1907, to the 10th October, 1908. On the 23rd January, 1908, M. surrendered the premises and license to M. M. & Co. A fresh letting was then made by M. M. & Co. (by means of a written agreement, unstamped) to L. who duly obtained on the 8th February, 1908, a Petty Sessions order for an *ad interim* transfer of the license to her. L. subsequently, deciding not to take the premises, signed the license and handed the same back to M. M. & Co. On the 21st April, 1908, M. M. & Co. made a further letting to D. and handed him over possession of the premises and of the license. On the 25th April following, D. applied for and obtained a Petty Sessions order for an *ad interim* transfer of the license to him, and on the 17th June applied to the Quarter Sessions for a certificate to entitle him to receive a transfer of a license to sell beer, &c., "at his house formerly in the occupation of L." This was refused, the Chairman of the Quarter Sessions holding that D. had no interest in the license. D. applied for and obtained a conditional order for a *certiorari* to quash the said adjudication, and while the proceedings in relation thereto were pending in the King's Bench Division, D. applied at the October

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and KENNY, JJ.

Sessions for a transfer and confirmation of the license "lately held by M.," and also applied in the alternative for a new license. The Chairman of Quarter Sessions entered "no rule" on the application for a transfer and confirmation, and adjourned the application for a new license to the next Sessions to give time to have the proceedings in the King's Bench Division disposed of. D. obtained a second conditional order for a *certiorari* to quash the latter adjudication, and the two cases were argued together:—

Held, by Lord O'Brien, L.C.J., and Madden, J., that there was no authority in the Petty Sessions to grant the *ad interim* transfer on the 25th April, 1908, there being neither removal, sale, nor assignment within the meaning of 6 Geo. 4, c. 81, sect. 21, or of the 18 & 19 Vict. c. 114, sect. 1; that when D. came before the Quarter Sessions on the 17th June with an application for a transfer, what he relied upon was an unauthorized license or authority from the Petty Sessions which was in no way binding on the Quarter Sessions; and that the Chairman was right in holding that at that date D. had no interest in the license.

Held, also, that when D. came before the Quarter Sessions in October, with an application for a transfer and confirmation, there was nothing to transfer or confirm, and that the Chairman was right in his adjudication, both as to the application for a transfer and the application for a new license.

Per Lord O'Brien, L.C.J.: If the application at Quarter Sessions, as distinguished from that at Petty Sessions, was for a transfer of L.'s so-called license, she was not a duly licensed person, and whatever she had she allowed to lapse.

Held, by Gibson, J., that the possession of an interim protection order from Petty Sessions, or of a temporary license under section 12 of the Act of 1874, formed no part of D.'s qualification to apply for a transfer at the October Sessions; that D., under his lease, represented derivatively M.'s interest by assignment or upon removal; that his application at October Sessions, in the absence of statutory objection, should have been granted, and that "no rule" was an invalid adjudication, and should be quashed; but that, as no legal advantage could result to D. from quashing the June adjudication, the conditional order in respect thereof should be discharged.

Held, by Kenny, J., that D. had such an interest in the premises and license as constituted him a transferee within the meaning of the transfer sections of the Acts; that his claim need not be based upon a direct and immediate dealing with a licensed person, and that he was entitled to his certificates at both June and October Sessions.

The meaning of "transfer of license" discussed.

The Court refused the application with reference to the order made in June, Kenny, J., dissenting; and, being equally divided as to the application relating to the October order, made no rule.

BY indenture of lease bearing date the 12th June, 1902, Macardle, Moore, & Co. demised to Rosina Maguire a licensed

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house and premises situate at Maguiresbridge, in the county Fermanagh, for fifty years, there being at the date of the lease a full publican's license attached to the premises. Rosina Maguire duly applied for and obtained at the annual Licensing Quarter Sessions held at Newtownbutler on the 22nd October, 1907, a certificate to entitle her to receive a publican's license, and in pursuance thereof she took out in her own name a license for the premises from the 10th October, 1907, to the 10th October, 1908. By deed of the 23rd January, 1908, Rosina Maguire surrendered the premises and the license to Macardle, Moore, & Co. Macardle, Moore, & Co. then agreed to sub-let the premises to a Mrs. Lillis. A written agreement was entered into, which was executed by Mrs. Lillis, but never stamped, as Mrs. Lillis, after obtaining a transfer of the license at Petty Sessions on the 8th February, 1908, decided not to take the premises, and signed the license, and handed same over to Macardle, Moore, & Co. By indenture dated the 21st April, 1908, Macardle, Moore, & Co. accepted Jas. Joseph Duggan, the prosecutor, as tenant of the premises, and about the same date handed over to him possession of the premises and of the license. On the 25th April, 1908, Duggan applied at Petty Sessions for a temporary transfer of the license to him, and the Justices granted him a protection order in the following terms:—

JAMES JOSEPH DUGGAN, of Derrylin, *Complainant;*
ALL WHOM IT MAY CONCERN, *Defendant.*

PETTY SESSIONS DISTRICT OF LISNASKEA, CO. FERMANAGH.

I certify that, upon hearing of a complaint that the said James Joseph Duggan requests he may be granted a transfer of the spirit license as now held by Rosina Maguire, at Maguiresbridge, in said District and County, an order was made on the 25th day of April, 1908, by the Justices present, for the said James Joseph Duggan, of Derrylin, to the following effect, viz.:—

Protection Order granted.

(Signed), GEO. ARNOLD,
Justice of said County.

This 24th day of June, 1908.

On the 13th May, 1908, Duggan served notice of his intention to apply to the Quarter Sessions for transfer in the following terms:—

TAKE NOTICE that it is my intention to apply at the next General Quarter Sessions of the Peace, to be held at Newtownbutler, in and for the Division of Newtownbutler, and County of Fermanagh, on the 17th day of June next, for a Certificate to entitle me to receive a transfer of a license to sell beer, cider, and spirits by retail, at my house situate on the west side of the Main Street of the town of Maguiresbridge, townland of Tattenderry, parish of Aughalurcher, barony of Magherastephens, and county of Fermanagh, formerly in the occupation of Mary Margaret Lillis, and in which I reside.

Dated this 13th day of May, 1908.

JAMES JOSEPH DUGGAN,
Applicant, Maguiresbridge.

B. LESLIE WINSLOW,
Solicitor for Applicant, Enniskillen.

To W. G. HENDERSON, ESQ., J.P., Maguiresbridge;
JAMES MURPHY, ESQ., J.P., Maguiresbridge;
J. W. HANRAHAN, ESQ., *Clerk of the Crown and Peace*, Peace Office, Enniskillen;

And to D. MURNANE, ESQ., D.I., R.I.C., Leraw, Lisnaskea.

The application came before the Quarter Sessions at Newtownbutler on the 17th June, 1908. The County Court Judge adjudicated alone, and held that he had no jurisdiction to entertain the application on the ground that Duggan had no interest in the license. The following was a copy of the entry:—

No.	Names of Applicants and Situation of Houses.	Witnesses' Names and Particulars of Publication of Notices.	Decision of Court.
Winslow. 1	James Joseph Duggan, Main Street, Maguiresbridge, parish Aughalurcher, and barony Magherastephens.	Transfer. Kettle service. Notices correct. S. C. Solicitor, for Rector of Parish, opposes, on grounds of unfitness of premises and unfitness of applicant, and that the applicant has no interest in the license. Applicant sworn; Peter Carroll; Sergeant Thos. Carroll; Deed 21 April, 1908, Macardle & Co. to applicant; D. Murnane, D.I.	Refused, on the ground that the applicant has no interest in the license. No rule on the other grounds; decision on them being unnecessary.

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Upon these facts a conditional order was made by Boyd, J., on the 23rd July, 1908, for a writ of *certiorari* directed to the Chairman and Justices of Fermanagh to bring up to be quashed the aforesaid adjudication on Duggan's application for a transfer of the spirit license held by Rosina Maguire in respect of premises situate at Maguiresbridge in said county, and for a writ of mandamus directed to the Chairman, commanding that he do enter continuances upon, and do proceed to rehear and determine the application on the grounds, as to the *certiorari*—(*a*) That said order is made without and in excess of jurisdiction; (*b*) that the said County Court Judge declined jurisdiction; (*c*) that said order is bad upon its face; (*d*) that the said application was in order, and should have been entertained.

Cause was shown against the motion to make absolute the foregoing conditional order by District-Inspector Murnane, who stated that the next Quarter Sessions after the expiration of a month from the *ad interim* transfer obtained by Mrs. Lillis on the 8th February, 1908, commenced on the 3rd April, and no application was made for confirmation of the said transfer. Mrs. Lillis having decided to emigrate, did not serve notice of intention to apply to the Quarter Sessions for the transfer, but she continued to reside in the house, and to open it for the sale of her stock until the 2nd April, 1908, inclusive, but ceased to open it or trade from the 3rd April, 1908. She did not leave the premises until the 16th April, 1908. The County Court Judge held that the transfer to Mrs. Lillis was good up to the ensuing Sessions, but not afterwards; and the notice of application to Quarter Sessions was for a transfer of a license of a house formerly in the occupation of Mrs. Lillis. He further held that there was no evidence of a transfer to Duggan from Rosina Maguire direct.

While the case was at argument it transpired that at the Sessions held at Newtownbutler on the 20th October, Duggan applied for a transfer and confirmation of the license lately held by Rosina Maguire, and also applied in the alternative for a new license. The County Court Judge stated, according to the affidavit of Mr. Winslow, Duggan's solicitor, that he would not allow the case to be proceeded with, that he had already given his decision at the June Sessions, and he understood proceedings were taken

for *certiorari* and mandamus, and that the present application for a transfer and confirmation of the license was a most improper proceeding, and he would not permit the application to be considered by the magistrates, and he accordingly made "no rule" on the application. The application for a new license was then proceeded with; and, there being no objection, the County Court Judge adjourned the case to the next Sessions, to give time for the case to be argued before the King's Bench.

When the facts were brought to the attention of the Court, counsel for Duggan were allowed to apply for, and were granted, a conditional order for a writ of *certiorari* to bring up this latter order of the 20th April, and for a mandamus to hear and determine the application for transfer and confirmation.

The arguments then stood adjourned to enable the applications to make absolute the two conditional orders to be heard together, and notice of motion to make absolute the latter conditional order having been served on the 10th November, 1908, the case was fully argued on all the facts.

James O'Connor, *K.C.*, and *Wylie*, for the prosecutor.

The Solicitor-General and *Dudley White*, for the Crown.

The arguments and cases cited appear from the judgment.

KENNY, J.:— Dec. 21.

This case comes before us on two motions for writs of *certiorari* and mandamus. The one seeks to make absolute a conditional order for a *certiorari* to quash an order dated the 17th June, 1908, of the Quarter Sessions held at Enniskillen, in the County of Fermanagh, whereby an application by the prosecutor, Duggan, for an interim license was refused on the ground that he had no interest in the license. The other is a primary application on notice—by leave of the Court—to quash a further order of the same Quarter Sessions Court, dated the 20th October, 1908, whereby an application by the prosecutor for transfer and confirmation of a license was dealt with by the determination of "No Rule."

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The case is a very important one indeed—more especially to the licensed trade—involving as it does most serious questions as to the right of transfer of a publican's license. The arguments have been at hearing for several days; and while both parties agree in saying that whatever conclusion we may arrive at in the case can be come to independently of, and without reference to, the results that may flow from it, still it is impossible to disabuse our minds of the impression that the essence of the present contest is the application of *Clitheroe's Case*(1). If we hold that Duggan is a proper transferee of the license, and that the two orders of Quarter Sessions were wrong in not treating him as such, then *Clitheroe's Case*(1) would apply, and an objection based on the number of existing public-houses in the locality could not be relied on. If the orders of Quarter Sessions be right, Duggan could only make a claim for a new license, the application for which would be open to any of the three recognized objections of (1) unsuitability of applicant; (2) unsuitability of premises; and (3) excessive number of existing public-houses.

The facts of the case are these. By a lease dated the 12th June, 1902, a firm of Macardle, Moore, & Co.—which I shall hereafter refer to as Macardle—demised to Rosina Maguire the licensed house and premises in question for a term of fifty years. I would conclude that she, thereafter, down to and including 1907, obtained an annual renewal of the then existing license. For the purposes of this case it is sufficient for me to say that the license of October, 1907, was taken out in her name, and that she continued to be the owner of the license and of the lessee's interest in the premises down to the 23rd January, 1908. On the last-mentioned date she by deed surrendered both premises and license to Macardle. On or about the same date—certainly before the 8th February, 1908—a written agreement was entered into between Macardle and a Mrs. Lillis, for a letting to her of the premises as licensed premises. Mrs. Lillis went into possession, and on the 8th of February obtained from the Justices at Petty Sessions, pursuant to the 18 & 19 Vict. c. 114, s. 1, what is sometimes called a transfer

(1) I. R. 11 C. L. 412.

order, sometimes an interim order, and sometimes, and indeed more generally, a protection order. In practice the determination of the Justices under this section is evidenced by an indorsement on the original license, purporting to transfer the license for a limited period—namely, until the Quarter Sessions holden next after the expiration of a month from the time of such transfer. In order to perfect her title to the license, and to constitute herself a duly licensed person, the transferee, Mrs. Lillis, should have then applied at the April Quarter Sessions for a certificate, which would have enabled her to obtain a license from the Excise authority. No such application was made, inasmuch as she abandoned the business about the 2nd April, and purported to re-assign the license to Macardle by indorsing her name on the lease, and by delivering it to him, together with the premises. From that time to about the 17th April no trade was carried on in the premises. On the 21st April a contract of tenancy in respect of the licensed premises was entered into by deed between Macardle and Duggan, on which occasion possession of the premises was delivered, and the license handed to Duggan. Being therefore the possessor of both premises and license, Duggan, on the 25th April, applied at Petty Sessions for a "protection order" of the same character as that which had been previously granted to Mrs. Lillis, and having, presumably, satisfied the Justices as to his title, obtained it. Being thus armed with what he regarded as a legal transfer of the license—though operative only until the June Quarter Sessions—and having carried on the business of a publican on the premises from the date of the Petty Sessions order, Duggan on the 17th June made the usual and necessary application at Quarter Sessions pursuant to the 37 & 38 Vict. c. 69 (the Licensing Act of 1874), s. 12, for a certificate to enable him to obtain a license from the Excise. The application was refused on the ground (as stated in the Spirit License Application Book) that the applicant had no interest in the license. Duggan then, on the 23rd July, 1908, obtained the conditional order in this case for a *certiorari* to quash the Quarter Sessions order of refusal, and subsequently, at the Annual Licensing Quarter Sessions on the 20th October, 1908, applied for a "transfer and confirmation" of the license—

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and also alternatively for a new license. On the former application the determination of the magistrates appears in their book as "no rule," while the application for a new license was adjourned to the next sessions. The case was argued before us, in the first instance, on the motion to make absolute the conditional order for a *certiorari* to quash the order of the 17th June, 1908; but as the discussion proceeded it was thought necessary to also impeach the order of the 20th October; and accordingly a notice of motion with that object has been served, and is now before us.

I may now, as shortly as possible, summarize the results as they occur to me of the various dealings with the license and the licensed premises which I have just detailed. The estate in the premises of the original lessee, Rosina Maguire, was determined by the surrender of the 23rd January, 1908, and the lessor Macardle was restored to his former estate; and, so far as the license could be transferred *inter partes*, the lessee divested herself of all right to it, and it passed to the lessor. Being thus entitled to the licensed premises and the license, Macardle made two successive agreements—the one to Lillis, and that having determined (for so we must take it), the other to Duggan. On the occasion of each letting, the premises passed as licensed premises so far as the parties could effect it. The license itself purported to be re-assigned by Lillis to Macardle, and was handed over by Macardle to Duggan on the occasion of the letting to him. No question was pressed before us as to the *quantum* of interest acquired by Duggan, or as to his right to be regarded as the owner *pro tanto* of Macardle's interest. In these circumstances I am of opinion that, regarding the case from the point of view of devolution of title and apart from the licensing statutes, Duggan must be regarded, not only as a successor in title in the licensed premises, but as a person in a sense claiming through the original lessee, Rosina Maguire. I turn to the affidavit of the District Inspector R.I.C., made upon the present motion, to see how the County Court Judge dealt with the situation. Having stated that the County Court Judge said that he had no jurisdiction to entertain any application for a transfer, inasmuch as Duggan had no interest in the license, the District Inspector adds as follows:—"The

County Court Judge held that the transfer to Mrs. Lillis was good up to the ensuing Quarter Sessions, and not afterwards; and the notice of application to Quarter Sessions was for transfer of a license for a house, formerly in the occupation of the said Mrs. Lillis. He further held that there was no evidence of a transfer to Duggan from Rosina Maguire direct." It is clear from the County Court Judge's ruling that he regarded the Petty Sessions order of the 25th April as wholly inoperative and in no way binding upon him. If Duggan had no interest in the license when he obtained that order, I think the County Court Judge was right in going behind it; but, in the view that I take of the case, Duggan had an interest in the license and in the licensed premises sufficient to justify the making of the Petty Sessions order. If the latter order were right, it ought to have been followed at Quarter Sessions. In dealing with the County Court Judge's refusal to grant the transfer, and the reasons alleged for his decision, I feel some difficulty in arriving at a conclusion as to what exactly he meant. Bearing in mind that a publican's license is a mere personal authorization, and not legally assignable, did he intend to rule that Duggan in order to establish his right should claim directly and immediately from the original licensee, or that Macardle was not competent to transfer any right in the original license; or did he mean that, in the circumstances of the case, the Licensing Acts did not warrant his treating Duggan as a person entitled to a transfer? I can scarcely think, notwithstanding the District Inspector's statement of his reasons, that he meant to decide that no one but an immediate transferee from the original licensee was entitled to a transfer. To have so decided would have been in direct opposition to numerous decisions under the Licensing Acts, and more particularly to *Oates's Case* (1). I shall therefore assume that he was dealing with the case from the point of view of those sections of the Licensing Acts dealing with transfers.

In order to appreciate the nature of the publican's claim, it is necessary to refer very shortly to the law at present governing

(1) [1901] 2 I. R. 352.

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the issuing of publicans' licenses in this country. They may be dealt with under three heads, viz.—(*a*) new licenses, (*b*) renewals, and (*c*) transfers. In the case of applications for new licenses, three objections are capable of being made at Quarter Sessions founded on (*a*) the unsuitability of the applicant, (*b*) unsuitability of the premises, (*c*) the number of previously licensed houses in the neighbourhood (1). In case of renewals to the same person, and for the same house as was licensed in the previous year, two objections only could be made, based upon the character of the applicant and the manner in which the house had been conducted (2). With reference to transfers they have been the subject-matter of decision in this Court, in—amongst others—the well-known and much criticized case of *The Queen* v. *The Recorder of Dublin*, known as *Clitheroe's Case* (3), where it was held, on grounds not as it seems to me wholly convincing, that although transfers fall within the 2nd section of the Act of William 4, which deals only with new licenses, and not within the 1st section, which applies only to renewals, yet the 4th section of the Act, which provided for the three objections in cases of new licenses, did not apply in its entirety to cases of transfers, and that the objection based upon the number of public-houses could not be relied on. This case has been regarded by the licensed trade in Ireland as the charter of the transferee, and, so long as it is unreversed, is binding on us. Duggan claims to be within it; and if we are satisfied that he is entitled to be regarded as a transferee, recognizable as such by the Licensing Statutes, he will be entitled to avail himself of the advantages which that decision confers.

Is he such a transferee, or is he to be treated as a "new beginner" who has to run the gauntlet in an application for a new license? The position depends on the Acts of 6 Geo. 4, c. 18, s. 21, 18 & 19 Vict. c. 114, s. 1, and 37 & 38 Vict. c. 69, ss. 12 and 37. By the 21st section of the Act of George, provision is made for exemption from further license duty during the current year in case of the death of the licensee or his removal from the licensed premises. The exemption is in favour of "the

(1) 3 & 4 Wm. 4, c. 68, s. 4. (2) *Ibid.* s. 1; 17 & 18 Vict. c. 89, s. 11.
(3) I. R. 11 C. L. 412.

executors or administrators, or the wife or child of such deceased person, or the assignee or assigns of such person or persons so removing as aforesaid, who shall be possessed of and occupy the house or premises before used for such purpose as aforesaid," and the exemption is to be carried into effect by an indorsement on the original license or otherwise to be made by the Excise Commissioners, whereby they are to authorize and empower any of the parties named to exercise or carry on the trade in or upon the same premises during the residue of the term for which the original license was granted. It will be observed that the section comes into force "upon the death" or "upon the removal" of the licensed person, and that not only are his personal representatives, but his wife, child, or assignee contemplated as persons who may be authorized to carry on the trade, provided such person fulfils the condition of possessing and occupying the licensed premises. Under the Act of 1833 (3 & 4 Wm. 4, c. 68) a certificate of Justices at Quarter Sessions would seem to have been necessary before this authorization could be given. The next Act dealing with transfers is that of 1855, but Mr. O'Connor, who has considerable experience in these matters, tells us that in cases of transfer it is the Act of George, and not that of 1855, that in practice is most frequently invoked. The latter Act, while not touching the jurisdiction of Quarter Sessions, makes provision for the period intervening before the question of transfer can be brought before that tribunal. It deals with the action of Justices in Petty Sessions as distinguished from that of Justices at Quarter Sessions; and, while it adopts some of the very terms used in the Act of George, it is directed to a different purpose and to a different method of attaining such purpose. It aims at giving an authority to trade in the interval between death, removal, or sale or assignment, and the hearing of the application at Quarter Sessions; it adds an additional event by the words "sale or assignment"; it creates the means for an immediate order by naming Petty Sessions; it gives that Court power to transfer the license by indorsement thereon, and it contemplates such transfer being made in favour of "any person not disqualified by law to whom it shall be proposed . . . to transfer any such license." The section concludes by providing that the person to whom the license is to be so transferred

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may carry on the trade on the licensed premises, but only up to the time when a Court of Quarter Sessions shall be held "next after the expiration of one calendar month from the time of such transfer and no longer." The Act of 1874 provides for the procedure at Quarter Sessions. After references in the 2nd, 9th, and 12th sections to new premises, renewals, and transfers, the 12th section enacts that the Quarter Sessions certificate for the grant of a license is to be given only at the annual Licensing Sessions (in October) except in the case in which there shall be a transfer at Petty Sessons under the Act of 1855 and in such other cases as to the Justices in Quarter Sessions shall seem fit. In those cases the certificate may be granted at any Quarter Sessions, but the section expressly limits the duration of "any license granted in pursuance of any such last-mentioned certificate," to the period intervening between its date and the annual Licensing Quarter Sessions, unless at such last-mentioned Sessions such certificate shall be confirmed.

Before referring to the effect of those transfer sections in their application to the present case, I think it necessary to advert to some points arising on their construction, which have been already the subject of decision in this Court. It has been held that, notwithstanding the use of the word "transfer" in the 1st section of the Act of 1855, the Petty Sessions order does not operate as a transfer and the person in whose favour it is made does not thereby become a "duly licensed person" (*Re Deighan* (1) and *Dumigan* v. *Walsh* (2)),while there can be little doubt that the Quarter Sessions interim certificate, under the 12th section of the Act of 1874 authorizes the issue of a fresh license, although the practice would seem to be in favour of a transfer of the existing license by indorsement (Mr. O'Connor's work on the Licensing Laws, pp. 89, 90, and *Brannigan's Case* (3)), and constitutes the person named in it a duly licensed person: *Brown* v. *Watson* (4). It has also been settled that the absence of a Petty Sessions order under the Act of 1855 is no obstacle to the obtaining of an interim Quarter Sessions order.

Is, then, Duggan a person who was entitled to be regarded as

(1) 31 I. L. T. R. 45.
(2) [1904] 2 I. R. 298.
(3) 4 L. R. Ir. 230.
(4) [1904] 2 I. R. 231.

coming within the 21st section of the Act of 1825 or the 1st section of the Act of 1855? If he comes within either, it would be sufficient to establish his claim to an interim Quarter Sessions certificate. The test to be applied is, whether he enjoys a possession of the premises springing from ownership: Holmes, J., in *R.* v. *Justices of Cork* (1); whether the original license has passed to him with the premises, and whether he has acquired such ownership of the premises upon the removal of a person duly licensed to carry on business in the premises, or the sale or assignment of such person's interest therein. If he does not fulfil those conditions, the only other possible application he could make would be for a new license; but, by the 37th section of the Act of 1874, a new license is defined to be a license granted in respect of premises in respect of which a similar license had not theretofore been granted, or, if granted, had been annulled or not in force during the preceding six months. Here the premises had been licensed during that period. In my opinion, he does fulfil the conditions, although no party in the chain of title can, within the authorities, be regarded as a "licensed person" except the original licensee, Rosina Maguire. She transferred both premises and license to Macardle, and removed from the premises. So far as the dealings *inter partes* are concerned, the links in the title are represented by Rosina Maguire, Macardle, Lillis, Macardle, and Duggan. There is no sale or assignment, direct and immediate from a "licensed person" to Duggan, nor has he acquired ownership directly and immediately upon the removal of a licensed person. If it be necessary for us to construe the Acts of 1825 and 1855 as contemplating only such a direct and immediate dealing as this, Duggan could not support his claim. In my opinion that is not the proper interpretation to place upon these statutes. I consider that by the use of the word "upon" the event is not restricted to a link in the title immediately following on the assignment by or removal of the licensed person, but that it may extend to a more remote dealing with the premises and license. As has been suggested at the Bar, I think that the word "upon" may be given the meaning of "after," or "subsequently

(1) [1895] 2 I. R. at p. 114.

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to," or "consequent upon," and I do not think such a construction would conflict with the Lord Chancellor's judgment in *Murphy's Case* (*R.* v. *Justices of Cork* (1)). If it be not given that meaning, then in the present case Macardle is the only person who could get a transfer, because he and he alone directly and immediately succeeded in title on the removal of or assignment by Rosina Maguire. In that point of view the only way in which this license could have been preserved would have been by a Quarter Sessions order in favour of Macardle, which would thereby have constituted him a licensed person. But Macardle, under the circumstances of this case, could not have obtained such an order after he transferred it to Lillis, inasmuch as his ownership and possession of the premises and his *quasi*-ownership of the license had determined. Therefore, if the immediate transferee could alone make title it would follow that no publichouse could be transferred or sold twice within the same twelve months, unless, upon the occasion of each transfer or sale, the transferor or vendor was either the original licensee or a person claiming through him and holding a Quarter Sessions certificate.

I cannot think that the right to a transfer depends on and can only arise under such circumstances. If it does it would seem to be opposed to the judgment of the Court in *R.* v. *Justices of Sligo* (2), where if the dates be correctly given, one of the intermediate transferors was neither the original licensee nor a person holding a Quarter Sessions certificate, and consequently not a licensed person.

I am, therefore, of opinion that Duggan had such an interest in the premises and license as constituted him a transferee within the transfer sections of the Acts; that his claim need not be based upon a direct and immediate dealing with a licensed person; and that consequently he was a person entitled to a Quarter Sessions certificate under the Act of 1874.

Having regard to the case of *R.* v. *Justices of West Cork* (3), the ruling at the Annual Licensing Sessions in October is a nullity and should be quashed.

The conditional order of the 23rd July, 1908, for a *certiorari*

(1) [1895] 2 I. R. 104. (2) [1901] 2 I. R. 392. (3) [1902] 2 I. R. 252.

and mandamus ought, in my opinion, to be made absolute; and we should also make an absolute order for a *certiorari* to quash the order of the 20th October, 1908, and for a mandamus to the Justices to enter continuances, and to proceed to hear and determine Duggan's application for a transfer and confirmation.

MADDEN, J. :—

The proceedings in this matter, and the facts of the case, have been so fully stated by my brother Kenny, that I need do no more than summarize them briefly, without entering into detail. The material facts are as follows:—On the 12th June, 1902, Macardle & Co. demised certain premises to which a publican's license was attached to Rosina Maguire, who obtained a renewal of the license, for the year ending the 10th October, 1908. On 23rd January, 1908, Rosina Maguire executed a surrender of her interest under the lease to Macardle & Co., and handed over the license to them. Macardle & Co. relet the premises on the 8th February, 1908, by an agreement for a yearly tenancy to one Lillis, who entered into possession, and obtained an *ad interim* order at Petty Sessions, under 18 & 19 Vict. c. 114, s. 1. On the 31st March, Lillis also surrendered the premises, and handed over the license to the lessor. This took place before the Quarter Sessions next succeeding the granting of the *ad interim* order at Petty Sessions. Finally, Macardle & Co. relet the premises to the prosecutor Duggan for a tenancy from year to year. All these instruments purport to deal with the license as well as with the licensed premises, and the license ultimately passed into the possession of Duggan.

On the 25th April, Duggan obtained an *ad interim* order from Justices at Petty Sessions, acting under 18 & 19 Vict. c. 114, s. 1, and on the 17th June he applied at Quarter Sessions for the certificate necessary in order to obtain what is known as a transfer of the license from the excise authority. This application was refused by the County Court on the ground that the applicant had no interest in the license.

We have therefore to consider the position of Duggan: first on the 25th of April, when he obtained the *ad interim* order, and secondly, on the 17th June, when, on the expiration of the

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protection afforded by that order, his application for a certificate was refused. This inquiry involves an examination of the statutory provisions now in force in relation to the transfer of licenses, so far as they are relevant to the present case. I shall presently explain the sense in which I employ the phrase "transfer of license."

The Excise License Act, 1825, deals with transfer from the fiscal point of view. The 21st section provides for the event of the death of a licensed person, or his removal from the licensed premises. It enables the Excise authority to empower a limited class of persons, bearing a certain relationship to the original holder of the license, and occupying the licensed premises, to carry on business under the protection of the license for the residue of the term for which it was originally granted. The persons who can avail themselves of this statute without taking out a fresh license, or paying additional duty, are the personal representatives—the wife or child, or the assignee or assigns—of a duly licensed person dying, or removing, as the case may be. The action of the Excise authority under this section was subject to the provisions of the Licensing (Ireland) Act of 1833, requiring an applicant for transfer, or for a new license, to obtain a certificate from Justices at Petty Sessions, and to the provisions of the Licensing Act of 1874, to which I shall presently refer.

The statute upon the construction of which the position of the applicant in the present case depends, as regards his application at Petty Sessions, has a wider application than the fiscal legislation contained in the Excise Act of 1825. It contemplates the interruption of the carrying on of the licensed business in three events, including those which were contemplated by the Act of 1825: (1) death of a duly licensed person; (2) removal of any such person from the licensed premises; or (3) the sale, or assignment by operation of law, or otherwise, of the interest of any such person in the licensed premises. But it places no restriction upon the class of persons to whom the *ad interim* authority to trade is granted, beyond providing that he shall be "not disqualified by law."

Some confusion has been caused by the inaccurate language in

which the action of the Justices at Petty Sessions is described. They are empowered, where the prescribed conditions of the exercise of jurisdiction exist, to "transfer, by endorsement thereon, any and every such license as aforesaid then in force to any person, not disqualified by law, to whom it shall be proposed at the time of such application to transfer any such license." From these words it appears that the action of the Justices is intended to be in aid of an inchoate transaction which, if carried out, would eventuate in the substitution of the intended transferee in the place of the person originally licensed. It provides a means of avoiding the interruption of business which would otherwise have occurred on the death or removal of the licensee, or the sale of the licensed premises, during the currency of the license, and before the substitution of a new duly licensed person. The order of Justices under this section is inaccurately described as operating by way of transfer of the license upon which it is endorsed. It is more properly described as a protection order. Any difficulty which might have arisen in the present case from the wording of this section has been removed by the decision of the Court of Appeal in *In re Deighan* (1), followed by this Court in *Dumigan* v. *Walsh* (2). It must be now taken as clearly established that the granting by Justices of an *ad interim* order does not place the person who obtains its protection in the position of a duly licensed person, but enables him lawfully to trade under the protection of a license of which he is not, at that time, the holder.

The protection afforded by an *ad interim* order obtained at Petty Sessions enures until the Quarter Sessions holden next after the expiration of one calendar month from the time of obtaining the order, and no longer. The procedure by which the holder of such an order is enabled to procure the certificate at Quarter Sessions necessary in order to enable him to obtain from the Excise authority either a fresh license or a transfer in a case coming within the 21st section of the Excise License Act of 1825, is prescribed by the 12th section of the Licensing (Ireland) Act, 1874. This is done by way of exception from a general enactment declaring that the certificate of Justices at Quarter Sessions,

(1) 31 I. L. T. R. 45. (2) [1904] 2 I. R. 298.

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when required previous to the grant of a license by an officer of Excise, shall not be granted except at an Annual Licensing Quarter Sessions. The exception runs thus—"Provided that in case any license shall under the authority of the Act of the Session of the 18th and 19th years of the reign of Her present Majesty, chapter 114, be transferred to any person, and in such other cases as may seem meet to such Justices or Recorder, a certificate may, notwithstanding the preceding provisions, be presented at any General or Quarter Sessions." The certificate granted under this section requires confirmation at the next ensuing Annual Licensing Quarter Sessions. If not then confirmed, the section provides that the license granted in pursuance of the certificate so given shall not be renewed.

The first question that we have to consider is the position and rights of Duggan when he applied for and obtained from the Justices at Petty Sessions the *ad interim* order of 25th April. What was then his position with regard to the license, and to the premises to which it had been attached?

Mr. O'Connor, on behalf of the applicant, contends that he came within the provisions of the section as to assignment, or, at all events, as to removal. Was there an assignment to Duggan by operation of law, or otherwise, of the interest of Rosina Maguire in the licensed premises? The interest acquired by Duggan in these premises was derived by way of demise from Macardle & Co., who were presumably, upon the evidence, owners in fee. There was no privity of estate or contract between him and Rosina Maguire, the licensed person with whom we are concerned. No doubt the surrender by Rosina Maguire of her interest in the premises enabled the owner to create a valid tenancy in possession in Lillis first, and afterwards in Duggan. But to apply to Rosina Maguire the term "assignor," and to either Lillis or Duggan the term "assignee," or to call the transaction an assignment, would be, in my opinion, a misuse of language.

The decision in this Court of *Dumigan* v. *Walsh* (1) has been referred to on this branch of the case. In that case one Dumigan was prosecuted for selling intoxicating liquor without a license.

(1) [1904] 2 I. R. 298.

The liquor was sold at the licensed premises during the currency of the year for which Dumigan had obtained a license, and at the time of the sale Dumigan was in lawful occupation of the premises under a tenancy from year to year. Between the granting of the license and the prosecution certain transactions took place which resulted in the alteration of Dumigan's interest in the licensed premises from lessee for years to a tenancy for six months. The question of Dumigan's interest in the premises was altered, but, in the words of Lord O'Brien, C.J., "the license, the personal privilege to trade, remained all through with Dumigan; it was not transferred to anyone else by the action of the magistrates, who alone had power to transfer it, and it could not be transferred by even the action of the magistrates from Dumigan to himself." The decision of the Court proceeded on the union, in the person of Dumigan, of the character of licensee, and of one in lawful possession of the licensed premises. No question of assignment of the premises arose, for Dumigan was incapable of assigning to himself. He simply got back possession of the licensed premises during the currency of the license for an interest different from that when it was granted. It is evident that the decision in this case had no bearing upon the position of Duggan, even if he were a person claiming under an assignment from the original licensee, a position which, for the reasons which I have stated, I do not think that he occupied.

Mr. O'Connor, feeling the weakness of this part of his case, preferred to rest the claim of Duggan on the provisions in 18 & 19 Vict. c. 114, s. 1, enabling the Justices to make an *ad interim* order "upon the removal of any such person from the house or premises at which he is authorized by any such license to carry on such business as aforesaid." As a proposition of law it must be admitted that the duly licensed person upon the removal of whom Duggan is compelled to claim is Rosina Maguire, for Lillis did not become by virtue of the protection order a duly licensed person. But, as a matter of fact, the removal which was the occasion of the application at Petty Sessions was the removal of Lillis, who gave up possession of the licensed premises on the 31st March to Macardle & Co. Duggan's application at Petty Sessions was subsequent in time to the removal of Rosina Maguire.

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But it could not, in my opinion, be correctly described as "upon" that removal. Dr. Johnson defines the word "upon" in its relation to time as meaning "in immediate consequence of." This does not import the absence of some interval of time, but it excludes the idea of relation to an intervening state of facts. If Duggan's application to Petty Sessions was made, as I think it was, upon, or in immediate consequence of, the removal of Lillis, it could not be also made upon the removal of Rosina Maguire and as Lillis was not a duly licensed person, the condition prescribed by the statute as to removal was not complied with.

On this part of the case Mr. O'Connor relied upon the decision of the Court of Appeal in *Brown* v. *Watson* (1) as authorizing this Court to put a meaning on the word "upon" sufficiently elastic to connect Duggan's application with the removal of Rosina Maguire.

The facts of *Brown* v. *Watson* (1), so far as they are material for the purposes of the present case, lie within a narrow compass. The question arose between the lessor and the personal representatives of a lessee of licensed premises who had covenanted "to preserve a valid publican's license, to do nothing whereby that license might be forfeited, or affected prejudicially, and at the end of the tenancy to do everything necessary to transfer a then existing license to the landlord's nominee." The lessee died between the obtaining of the Justices' certificate at the annual Licensing Sessions held in October, 1902, and the payment of the duty. This was paid by the executrix, and the license was taken out in the name of the lessee. This license was, of course, inoperative; but an event had occurred, namely, the death of a duly licensed person, upon which an *ad interim* authority to carry on the trade could have been taken out. But the executrix had no authority under the will of the lessee to carry on his trade. She did not do so in fact, and after complicated negotiations and correspondence, to which it is unnecessary to refer in detail, she ultimately surrendered the premises to the lessor, who entered into possession on the 2nd February, 1903. Meanwhile, on the 29th November, 1902, an *ad interim* authority had been obtained and endorsed on the license

(1) [1904] 2 I. R. 218.

in the name of the executrix, by a solicitor who had acted without authority from her, apparently in the interest of the lessor. This order was never acted upon, and it has no relevance to the real question in the case, which is thus stated by FitzGibbon, L.J. (at p. 230) :—"Whether on 31st January, when she surrendered the premises, Mrs. Watson (the executrix) was disabled by a previous breach of the tenant's contract from transferring the license, or doing acts which would have enabled the plaintiffs thereupon to obtain a license as 'transferees' as distinguished from being only able to apply for a license to themselves as 'new beginners' without the benefits which, if *Clitheroe's Case* (1) be law, attach to the position of a 'transferee.'" The Court of Appeal, affirming the decision of this Court, held that nothing had occurred before the 31st June, 1902, by which the license had been forfeited or so prejudicially affected by the closing of the licensed premises that it could not be transferred to the landlord on the surrender of the licensed premises. The Court held that there had been no breach of the contract of tenancy, but even if there had been such a breach that the lessors might "still have taken a transfer of the license from Mrs. Watson, and applied for an *ad interim* transfer, and subsequently for a license for themselves." These proceedings, it is said, would be taken "upon the death of a duly licensed person," the lessee, and the length of time which would have elapsed since the happening of this event, and the application of the lessee at Petty Sessions, added to the intervening attempt to deal with the license, is relied on as showing that Duggan's application might with equal truth be described as made "upon" the removal of Rosina Maguire.

Now, in the first place, there is nothing in the judgment of FitzGibbon, L.J., to show that he regarded the application by the landlord for an *ad interim* transfer as one which would be made upon the death of the lessee, and it seems to me that the application would be more properly made by him under the following words :—"On the sale of or assignment of his interest therein by operation of law or otherwise." The landlord obtained an assignment of the interest of the lessee, a duly licensed person, in the

(1) I. R. 11 C. L. 412.

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licensed premises, from his personal representative, and was thereupon entitled to obtain an *ad interim* transfer. But even if we ought to regard the application contemplated by the Court of Appeal as made "upon" the death of the lessee, there is a distinction between that case and the present which appears to me to be of vital importance. Notwithstanding the lapse of time, the application might, in that case, be described as "in immediate consequence of" the death of the last duly licensed person. No other death had intervened to interrupt the relationship between the two events, and there had been no intermediate trading. In the present case there had been an intermediate trading, followed by a removal, the introduction of which, in my opinion, renders the word "upon" inapplicable in the present case.

What then was the position of Duggan, when his application for a certificate came before the Justices at Quarter Sessions, in the month of June? He was in lawful occupation of the licensed premises, but not under a title derived from a lawfully licensed person. He had physical possession of the license, and he had obtained an *ad interim* order of Petty Sessions. This order expired at the sitting of the Quarter Sessions. It was not, in my opinion, a lawful order in its inception; but as it had no continued effect, and did not determine the right of the applicant at Quarter Sessions, I do not regard it as essential, in any view of the case, that it should be brought into this Court to be quashed, even if it were legally possible that this should be now done. This order had legalized Duggan's trading so long as it remained in force, for it might be lawfully granted to any person not disqualified by law, "to whom it shall be proposed at the time of such application to transfer any such license."

This expression is not technically accurate. The license is, in its nature, incapable of assignment or of transfer; and each license annually issued is, in legal intendment, and considered in itself, a new license. What is called the renewal of a license is the issuing of a new license, annually, to one and the same person continuing in occupation of the licensed premises; and what is called "transfer" is the issuing of a new license to a person whose occupation of the licensed premises bears a certain relation to the occupation of the person lastly licensed. But upon this

legal foundation there has been founded a distinction which has important practical consequences, to which is due the general adoption of the convenient phrase "transfer of license." "The Legislature," in the words of May, C.J. (*R.* v. *Recorder of Dublin* (1)), "at an early date made provision for the continuance of a license notwithstanding the death of the holder, and for its virtual transfer, should the holder assign and cease to occupy the premises named in his license." The importance of the distinction between a case of "virtual transfer," and the granting of what is known as a new license is founded, not on a difference between these transactions regarded in their legal aspect, but upon the practical difference, which was established by the case from which I have quoted, between the exercise of jurisdiction by the licensing authority in a case of what is called a "transfer," and in the granting of what is known as a new license.

The following observation of Fitz Gibbon, L.J., on the subject of transfer from a person duly licensed, appears to be applicable to the present case:—"Where a licensed person holds licensed premises, with his concurrence, or on devolution of title from him in certain specified ways, but not otherwise, the license may pass with the premises by way of transfer; but where the connexion between the person and the premises is determined, and the common title to both license and premises is interrupted, I think the right to renewal or transfer is lost, and those claiming either on personal grounds, as representing the holder of the former license, or as owners of the premises, must submit their claims to the Justices merely as applicants for new licenses": *R.* v. *Justices of Tipperary* (2).

If I am right in the conclusions at which I have arrived, it follows that the common title to both license and premises had been interrupted when Duggan applied for a certificate as "transferee" in June; that the County Court Judge was right in refusing to grant the certificate, or to confirm it at the Annual Licensing Sessions in October; and that Duggan's *locus standi* is that of an applicant for what is known as a new license.

(1) I. R. 11 C. L. at p. 413. (2) 6 L. R. Ir. 136.

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GIBSON, J. :—

These applications raise two questions for decision :—(1) Was the ground on which Duggan was refused a license in June valid? (2) Was the order of "no rule" on Duggan's application in October, for transfer and confirmation, a correct legal determination?

Before dealing with these two points, I shall consider the crucial question raised by Mr. O'Connor, the meaning of transfer and transferee in our licensing law.

Under the statutes, up to the Act of 1833, an assignee was like any other new beginner. Under the Act 55 Geo. 3, c. 19, if a person had not an existing license capable of renewal under sect. 25, he must apply to Quarter Sessions, which, subject to two objections, as to character and convenience of premises, could grant him a license: sects. 28 and 30. In applying for such new license, a so-called transferee stood in the same position as any other new beginner, was subject to the same objections, and occupied the same legal status. The statute did not contemplate any transfer of the license proper, but sect. 42 authorized the Excise by indorsement to enable assignees, heirs, executors, &c., of a licensed person to trade for the residue of the original license period on production of a Justice's certificate of character. This Excise authority, which was founded on fiscal reasons to prevent the benefit of the payment of duty being lost, was ministerial, and was not subject to *certiorari* (*Reg.* v. *Salford* (1)), did not transfer the license, and when the transferee came to apply for a new license gave him in law no legal advantage as compared with any other new applicant. Following an intervening statute, the Excise Act, 6 Geo. 4, c. 81, s. 21, which applies to England as well as to Ireland, amended sect. 42 by deleting "heirs," substituting "wife or child" and adding "removal," but it left the Excise indorsement a mere ministerial protection, not operating as a transfer of the license or continuing it in the new trader. Whether such Excise protection was got or not, what the assignee applied for at Quarter Sessions was a new license and nothing else.

The Act of 1833 kept the assignee applying at Quarter

(1) 18 Q. B. at p. 691.

Sessions in the new-beginner class as before; his application under sects. 2, 3, and 4 for a new license could be made at any Quarter Sessions, but to the two previous competent objections, a third was added, the number of previously licensed houses in the neighbourhood, a ground of objection frequently acted on in England, as the cases show. Inasmuch as the assignee had before 1833 no better legal claim than any other new beginner; inasmuch as the Excise indorsement did not transfer the old license, or make the assignee a licensed person, and as the three objections are all linked together, it would seem to me clear that the phrase "previously licensed houses" cannot include houses whose licenses at the date of Quarter Sessions had no continuing life, and in respect of which the applicant was in law a mere new beginner. *Clitheroe's Case* (1), deciding that the third objection does not apply to an assignee, binds this Court; but the premises on which the judicial conclusion was based have all been overruled. The English law was quite different from what it was supposed to be. The so-called transfer order under 18 & 19 Vict. c. 114, it is now settled, does not, any more than Excise protection, transfer the license, being merely a protection order till Quarter Sessions: *Deighan's Case* (2); *Dumigan's Case* (3); *Price* v. *James* (4). Possibly *Clitheroe's Case* (1), founded on invalid premises and manifest misconstruction of the statute, might now be overruled by the Court of Appeal in the same way that in *M'Naul's Case* (5), *Billing* v. *Welch* (6), though a conveyancing decision in which many titles probably had been passed, was overruled. The House of Lords cases supply many examples of this kind: *Hamilton* v. *Baker* (7); *The Mersey Docks Case* (8); *Gray's Case* (9); *The West Ham Case* (10). The Court of Appeal is our House of Lords in licensing cases, as in *certiorari* there can be no further appeal. There can be no prescription binding the Court to perpetuate recent misconstruction of a modern statute.

Taking, however, *Clitheroe's Case* (1) as binding this Court,

(1) I. R. 11 C. L. 412.
(2) 31 I. L. T. R. 45.
(3) [1904] 2 I. R. 298.
(4) [1892] 2 Q. B. 428.
(5) [1902] 1 I. R. 114.
(6) I. R. 6 C. L. 818.
(7) 14 App. Cas. at p. 422.
(8) 11 H. L. Cas. 433.
(9) 11 Cl. & F. 427.
(10) [1908] A. C. 1.

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we cannot allow it to pervert or warp the interpretation of the Licensing Acts as a whole; it must give way to *Deighan's Case* (1), *Dumigan's Case* (2), and it cannot be extended beyond what it decides, viz., that the assignee of licensed premises is at Quarter Sessions free from the third objection. It does not take him out of the class of new beginners, where he was before 1833, where the Act of 1833 left him, and where he remains still.

In this state of law, and long before *Clitheroe's Case* (3), 18 & 19 Vict. c. 114 was passed. It is modelled on 5 & 6 Vict. c. 44 (English), and in three events enables the Justices to transfer a license by indorsement thereon, so as to enable the indorsee to trade till the Quarter Sessions next after the expiration of one calendar month from time of transfer. This judicial order replaces the Excise protection, which had a different period of operation; it was plainly discretionary, and could only be made when Quarter Sessions was not sitting, and, like the Excise order, was, though called a transfer, not a transfer of the license proper, but merely a protection order: *Deighan's Case* (1); *Price* v. *James* (4); *Dumigan's Case* (2). The reference to Quarter Sessions relates to the statute of 1833, under which applications for a new license could be made to any Quarter Sessions. The Act 18 & 19 Vict. c. 114 abridges the right previously enjoyed, by making the indorsement a discretionary judicial act, and by shortening the operation of the protection. After this Act the effect of the legislation was that an assignee still remained in the new-beginner class, and when he applied to Quarter Sessions was exposed to the statutory objections under the Act of 1833.

Notwithstanding some dicta the other way, it would seem that the procurement of a protection order under the Act of 18 & 19 Vict. c. 114 did not, any more than the Excise protection before, form any part of the applicant's title as assignee or otherwise in applying to Quarter Sessions Court for a full license. The Act gives a privilege which the assignee is not bound to use. The assignment might occur in some localities where Petty Sessions sat at remote intervals at a time when there would be no opportunity of getting a protection order before Quarter Sessions; the

(1) 31 I. L. T. R. 45.
(2) [1904] 2 I. R. 298.
(3) I. R. 11 C. L. 412.
(4) [1892] 2 Q. B. 428.

very expression 'protection order' negatives that it can be a condition to the assignee's right to apply at Quarter Sessions; above all, the fact that the Justices can refuse to make the order in the exercise of their discretion (*Cox's Case* (1)) is conclusive to show such order cannot be a condition, as such refusal, if the order was a condition, would exclude the applicant at Quarter Sessions, and leave *Clitheroe's Case* (2) of little value to publicans. It would be unintelligible that Quarter Sessions in respect of licenses should have no discretion, and yet that Petty Sessions should enjoy a discretion which should fetter the jurisdiction of Quarter Sessions. For these reasons I am of opinion that the granting or refusing of a discretionary order, which could last only to next Quarter Sessions, could not affect legally an applicant's title to demand a license under the Act of 1833, if no statutory objection was substantiated against him at Quarter Sessions. The fact that the jurisdiction of Justices is not exerciseable during Quarter Sessions supplies a further weighty argument in support of the same conclusion.

Why is it that the conditions controlling the privilege given by 18 & 19 Vict. c. 114—death, assignment, and removal—are nowhere expressly extended to applications at Quarter Sessions? The obvious answer would be, that as at Quarter Sessions, an assignee was in legal quality a new beginner, the character in which he got the premises was legally immaterial. When his protection order expired, he was like all other new applicants; though, according to *Clitheroe's Case* (2), he would, if assignee, not be obnoxious to the third objection. It is generally assumed that in so-called transfer applications at Quarter Sessions 18 & 19 Vict. c. 114 is to be read as in some way defining the character of devolution; and, for the purpose of this judgment, I shall act on that assumption.

Some confusion has arisen from not bearing in mind the successive stages of the legislation in their historical development. The first stage is before 1833, when all new applicants (including assignees) enjoyed identical rights, and were subject to identical objections, with a special right in assignees to get from the Excise

(1) 16 L. R. Ir. at p. 434. (2) I. R. 11 C. L. 412.

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authority the benefit of the original license till its expiration. The second stage was the Act of 1833, which (but for *Clitheroe's Case* (1)) preserved the same identity of right and objections, adding one new objection. The third stage is the period after 18 & 19 Vict. c. 114, and before 1874. Throughout the assignee remained at Quarter Sessions a new beginner. None of the statutes recognizes such a thing as the transfer of a license at Quarter Sessions. The privilege given by 18 & 19 Vict. c. 114 was a curtailment of the privilege given by the earlier statutes, relating to Excise indorsements.

The statute of 1874 introduced a further restriction, confining applications for new licenses, which up to this could have been made at any Sessions, to the Annual Licensing Sessions. Section 12 enabled a temporary license to be given at other Quarter Sessions in two cases. One was where a person had obtained a protection order under 18 & 19 Vict. c. 114. As that Act made such order determine at the next Quarter Sessions, it was obviously reasonable, when the power of applying for a full license was taken away from General Quarter Sessions, that the holder of a Justice's order should be allowed to bridge over the interval before Annual Licensing Sessions. The other case was where the Sessions saw fit to grant such temporary license. The word "may" applies to both classes of applicants, and imports discretion and right to refuse. If the Petty Sessions had a discretion under 18 & 19 Vict. c. 114, so have the Quarter Sessions under section 12. The same procedure "as heretofore" was to be followed in relation to such temporary licenses. Does this mean that the statutory objections are available and, if substantiated, would preclude the exercise of the discretionary jurisdiction created by section 12? The temporary license carried with it no right of renewal, unless it was confirmed at Annual Licensing Quarter Sessions. Section 12 is, like 18 & 19 Vict. c. 114, an enabling enactment; and the possession of a license under this section does not constitute any necessary part of the assignee's right to apply for a full license at Licensing Sessions. At that Sessions the applicant, whether he held a temporary license or not, was open to the statutory objections.

(1) I. R. 11 C. L. 412.

In other words, a confirmation application is one for a new license under the Act of 1833, free from the third objection in the case of a holder of goodwill. In the absence of proved objection the October Quarter Sessions could not refuse to issue such new confirmation license, in the exercise of discretion; as otherwise a person getting a temporary license under section 12 would be in a worse position than a pure new beginner, who can insist on a license if there is no objection. For this reason I think the *dictum* in *Brannigan's Case* (1) is erroneous. The case related to a person who got a license without having an order under 18 & 19 Vict. c. 114; but that makes no real difference, as section 12 only gives a person provided with such order a status to apply, but leaves the discretion of the Quarter Sessions, under section 12, unaffected. A person who gets a temporary license under section 12 does not forfeit the rights he would possess under the Act of 1833 as a new beginner. If the jurisdiction in case of the holder of a temporary license is discretionary, and the confirmation order is also discretionary, the advantage acquired from *Clitheroe's Case* (2) disappears. The application under section 12 might in that view be refused at discretion, and if granted might not be confirmed in like exercise of discretion, without any regard to statutory objections. This is, I think, an impossible contention. The license under section 12 is discretionary, but the function of Sessions in October, though described as confirmation, is, in substance and reality, the granting of a new license under the Act of 1833.

I therefore concur with Mr. O'Connor that in Ireland there is no such thing as the judicial transfer at Quarter Sessions of a license; what is given is a new license. The assignee of licensed premises enjoys three legal rights or advantages: he can trade under a protection order till Quarter Sessions; with such protection order he has a status to apply for a temporary license under section 12; and he is free, if under *Clitheroe's Case* (2), from the third objection. But all through he is a new beginner; what he gets at Quarter Sessions is a new license, not the old license transferred.

(1) 4 L. R. Ir. 230. (2) I. R. 11 C. L. 412.

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What is popularly called a transfer is the assignment or devolution of the premises with the goodwill attached; but the ownership of such goodwill, though of much money value, as is shown by the practice in rating and estate duty assessment, carries with it no legal enforceable right binding the action of Licensing Sessions, and it does not vest in the owner of such goodwill any legal title to differential treatment on an application for a full license, save as regards the third objection. The goodwill is attached to the premises: *Kelly* v. *Montague* (1); and to pass it, there must be some kind of privity between the licensed person and the succeeding owner, but such privity need not be direct; it may be by a series of devolutions: *Brown* v. *Watson* (2). What is of value on the sale of a public-house is the practical goodwill which, though not clothed with any legal right, represents business value from the likelihood of preference of an old-established undertaking as compared with a wholly new enterprise.

Having thus stated my general conclusions as to the status of a so-called transferee, I turn to the order of June. It refused Duggan's application for a temporary license on the ground that he had no interest in the license. Duggan applied under sect. 12 of the Act of 1874, as possessing the status conferred by a protection order, and not under the general discretionary power. If that order was invalid, it could and should have been quashed. The Judge treated it as a nullity. If he was wrong, his order cannot stand, as his refusal would be based on an illegal ground, and he would have exceeded and declined jurisdiction, though he had a discretion on general grounds, if he had seen fit to exercise it.

The Solicitor-General contends that the Justices' order was bad, because Duggan was neither assignee of the licensed premises nor in possession on removal of the licensed person, Rosina Maguire.

The importance of the points argued is manifest when the Act 18 & 19 Vict. c. 114 is applied to—(1) a licensed house put in settlement, where a remainderman is in no privity of estate towards

(1) 29 L. R. Ir. 429. (2) [1904] 2 I. R. 232.

the licensed tenant for life; (2) a licensed house let by a landlord to a licensed tenant, with covenant by the latter at end of the lease to give up premises and license; (3) a freehold publichouse descending to the heir, while the license proper remains vested in the executor. In many cases of the second type it has been assumed that the landlord on getting up the license would represent the tenant, and could get an order on that basis: *Brown* v. *Watson* (1); O'Connor, p. 115; *O'Brien's Case* (2); *Leney's Case* (3). The case of an heir-at-law is dealt with in *Kelly* v. *Montague* (4), an instructive authority as to the nature of license, goodwill, and devolution.

First, as to assignment. Was there an assignment of Rosina's "interest therein"? During the argument it was assumed that the lease to Duggan operated as from 21st April, its date; and it was argued that on that basis (on which apparently the Judge acted), there was on the facts no assignment. Since the case closed I have found, on reading the lease, that the term was to begin on May 1st, and that Duggan's interest in possession before that date was that of tenant-at-will of the premises with goodwill. For clearness I shall first discuss the question argued, and then consider this new point separately.

It is admitted that the landlord, on Rosina's surrender, though her interest merged, and at the time of application he would have had another estate, would have possessed the status of assignee to entitle him to an order under 18 & 19 Vict. c. 114. This title to premises and goodwill he could have transferred, and the ultimate transferee could have got a protection order: *Brown* v. *Watson* (1). It is also admitted that his "interest therein" includes part of the interest in the premises. A licensed person holding in fee or for a long term might demise the licensed premises for a short term, and such demise, though an assignment of only portion of his interest, would make the lessee an assignee. What is relied upon is the creation of a new tenancy in Mrs. Lillis, and then a second new tenancy in Duggan. The protection order to Mrs. Lillis cannot affect the question, as it did not disturb the original

(1) [1904] 2 I. R. 232.
(2) 6 L. R. Ir. 129.
(3) [1908] 1 K. B. 79.
(4) 29 L. R. Ir. 429.

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license: *Dumigan's Case* (1). What we have to deal with is transferable goodwill, not a license as a quasi-negotiable instrument. When Rosina surrendered the premises, and gave up the license, the landlord had complete *jus disponendi*; he could have sold to Mrs. Lillis, and she could have sold to Duggan. His letting instead of selling can have no different result. When Lillis surrendered, he was in of his old estate, and he was entitled to demise the premises, clothed with Rosina's goodwill, to Duggan, whose occupation interest is fed and supplied out of Rosina's original interest. The accidental circumstance that Rosina's interest, owing to the relation of landlord and tenant, may have legally merged, cannot affect the substantial continuance of the goodwill attached to the premises.

Effective enjoyment of goodwill ownership can hardly depend on the nature of the transferee's estate previous to transfer, so as to involve that, as between landlord and tenant, to preserve goodwill, the assignment must always be made to a third party. On the reasoning in *Brown's Case* (2) and *Kelly* v. *Montague* (3) I would think that the lease made Duggan holder of Rosina's goodwill in the premises. It was conceded by the Solicitor-General that if a direct transfer of the paper license from Rosina to Duggan was necessary she would have made it; and as no point of the kind was made in the Court below when the objection, if any, could have been cured, it cannot now be relied on: *The Calliope* (4); *Smith* v. *Baker* (5). In my opinion a second indorsement by Rosina was unnecessary, as by surrender and by indorsing and handing over the license to the landlord she sufficiently indicated her final intention to vest in him her entire goodwill. The statute requires the license to be produced before, and indorsed by, the Justices, but it does not require the license-holder to indorse it, though such indorsement is usually required as conclusive proof of the assignment of good-will. The license is not negotiable, and cannot pass by any form of indorsement on the part of the licensed person.

If the application was not made by Duggan "on assignment,"

(1) [1904] 2 I. R. 298.
(2) *Ibid.* 232.
(3) 29 L. R. Ir. 429.
(4) [1891] A. C. at p. 23.
(5) *Ibid.* at p. 333.

was it made "upon removal"? "Removal" refers to Rosina, not Mrs. Lillis, who never was a licensed person, and who had no assignable interest in the licensed premises as such: *Dunigan's Case* (1). The phrase "upon removal" does not connote simultaneity; it denotes the event, and is the same as "consequent on removal." The expressions "upon death" and "upon the assignment" clearly must have this effect, as *Brown* v. *Watson* (2) demonstrates. It is said that though Rosina was removed, in fact there was no such removal as the statute contemplates on two grounds. The first is that the application did not synchronise with the removal. *Brown* v. *Watson* (2) answers this. The second is the break or interruption caused by the letting to Lillis. But she never became "a licensed person." On her surrender the goodwill revested in the landlord; the intermediate dealing does not alter the character of the event, namely Rosina's removal, on which Duggan's title as partial assignee of the landlord's title depended. Any other view would seriously fetter landlords and others in dealing with goodwill attached to the premises.

I have discussed this point at length, as in my opinion the real question for decision is, whether in October Duggan represented the goodwill under the lease, irrespective altogether of the magistrates' order or the June refusal. Even if Duggan's application in June was rightly refused on the ground that the term of the lease had not begun when the magistrates' order was made, that would not affect Duggan's right to apply in October if at that time he represented Rosina's goodwill.

Whether Duggan, if he represented that goodwill on May 1st, was qualified to get an order in April, is a question of difficulty which in my opinion it is unnecessary to decide. He was put into possession as at least tenant-at-will with goodwill attached, and his application for a protection order was with the landlord's implied assent. Possession plus goodwill is the essential fact. Suppose a tenant of a licensed house had suffered a judgment in ejectment for non-payment of rent, followed in a country case by statutory notice making him caretaker, he could legitimately trade under his old license, and if he got a new tenancy, the

(1) [1904] 2 I. R. 298. (2) *Ibid.* 232.

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possession remaining undisturbed, his license could be renewed: *Dumigan's Case* (1). If a wrongdoer in possession without title who is on his way to acquire the fee could get a license and transfer it, the same right would seem to be attached to rightful possession.

This brings me to the October application, when Duggan applied for a transfer and confirmation. There was at that time nothing to confirm, as the license under sect. 12 had been refused. The October application was, in its essence, as I have already pointed out, an application for a new license, and whether there was a previous temporary licensee in existence or not, and whether Duggan had got an order under 18 & 19 Vict. c. 114 or not, Duggan's position was the same. He was entitled to demand a license, unless either of the two statutory objections could be substantiated against him, as under his lease, at all events from May 1st, he represented Rosina's goodwill. There being no temporary license vested in him, Duggan's application should have been treated as a so-called transfer application *simpliciter*. "No rule" on such application was an invalid order, as failing objection the applicant was entitled to a license: *Crawley's Case* (2). Supposing that the June order was wrong, there would be a further objection to the October order. The former order was under appeal to this Court, and might be reversed; meanwhile the Court of Quarter Sessions ought not to have made an order which, while it stood, would make any adjudication of this Court futile. The Judge should have adjourned the application or stated his reasons on the face of his order. If that reason had been that Duggan had no interest in the license, and this Court held otherwise, the order would have been at once quashed. "No rule" is always an improper order for a Court of limited jurisdiction. It discloses no reason, may cover an illegal decision, and does not show a proper exercise of jurisdiction.

My conclusion on the respective applications is as follows:—

Possession of a protection order, or of a temporary license under sect. 12, formed no part of Duggan's qualification to apply in October. His application in October was governed by the Act

(1) [1904] 2 I. R. 298. (2) [1902] 2 I. R. 252.

of 1833. No legal advantage could, therefore, result to Duggan from making the first conditional order absolute, and it should be discharged.

Duggan, in October, under his lease operating from May 1st, represented Rosina's interest then vested in the lessor and transferred by him to Duggan, and as owner of such goodwill was entitled to demand a license on the basis of *Clitheroe's Case* (1), free from the the third objection, but subject to the other two, if made. On such application "no rule" was an illegal adjudication, and should be quashed. The second conditional order, therefore, should, in my opinion, be made absolute.

LORD O'BRIEN, L.C.J. :—

I agree in the result arrived at by my brother Madden. The dominant factor which meets us at the threshold of this case, and which we ought never lose sight of, is that the County Court Judge was asked to grant a "transfer." This application for a transfer was opposed by the Sessional Crown Solicitor on behalf of the rector of the parish, on the ground of the unfitness of the premises, unfitness of the applicant, and that the applicant had no interest in the license. The application was refused on the latter ground, that the applicant had no interest in the license. No rule on the other grounds as to the unfitness of the premises and the unfitness of the applicant was made, decision on them being unnecessary. All this appeared from the Record of the Crown and Peace Office, to which I refer. I hold the extract in my hand.

Suppose the *certiorari* was granted in reference to the order of refusal on the 17th June, is the case to go back to the Quarter Sessions to have the other grounds of objection argued? As to this I say nothing, as I think the *certiorari* should not be granted. A transfer then was applied for, and refused. The case before us, so far as related to the application made on the 17th June, must be dealt with as one for a "transfer." As to this I will read a sentence from the judgment of Palles, C.B., in

(1) I. R. 11 C. L. 412.

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R. (*Murphy*) v. *Justices of Cork* (1). Mr. Ronan argues that the Quarter Sessions ought to have entertained the application as for a new license, and that as they did not do so the case ought to be now sent back to them to consider it in that light. The application to Quarter Sessions, however, was not only in terms for a license *by way of transfer*, but at the Quarter Sessions the application was argued solely on the ground that the applicant was entitled to a transfer, and this was done advisedly to obtain the benefit of the decision in *Clitheroe's Case* (2).

To the same effect is *Jordan* v. *Roscommon Justices* (3). Here the notice was for a transfer, and the application at Quarter Sessions was for a transfer. The reason was obvious, viz., to get the benefit of the decision in *Clitheroe's Case* (2).

It is well to make the precise sequence of events and their nature quite clear. I shall give the facts in order of date. They are as follows:—

On the 12th June, 1902, Macardle & Co. leased the premises to Rosina Maguire for fifty years. Rosina Maguire took out in her own name a license for the said premises, from the 10th October, 1907, to the 10th October, 1908.

On the 23rd January, 1908, by indenture of that date, Rosina Maguire surrendered to Macardle & Co. the premises, and purported to assign the license; but Macardle & Co. never applied for a transfer of the license. Rosina Maguire's license was not transferred to Macardle & Co.—it was not transferred to them by the licensing tribunal, whether Justices of the Peace at Petty Sessions, or licensing authority at Quarter Sessions. I take it that a license can be assigned or transferred by the licensing authorities alone, and not by act of the parties. The parties may purport to assign or transfer; but assignment or transfer is inoperative, until it receives the sanction of the licensing authorities.

The 8th February, 1908, is the next date; and what took place on this date is important. By indenture of this date, the 8th February, 1908, Macardle & Co. let to Mrs. Lillis the premises and the retail license attached, to hold from the said 8th February, 1908, as tenant from year to year. It was provided by the said

(1) [1895] 2 I. R. 104. (2) I. R. 11 C. L. 412. (3) 4 N. I. J. R. 66.

indenture of agreement that the tenant should carry on the business of publican, grocer, and vintner only, and should use the premises as a public-house or tavern for the sale of liquor to be consumed on the premises, and that during the continuance of the term thereby created should keep the premises open as a public-house, &c. The various provisions of the agreement of letting made it manifest that Mrs. Lillis intended to carry on business as a publican. This is all-important when considering the observations of Lord Justice Fitz Gibbon in *Brown* v. *Watson* (1), which have been referred to. And it is to be borne in mind that on the selfsame day, on the 8th February, 1908, Mrs. Lillis, acting on the agreement of the same date, got a temporary transfer of Rosina Maguire's license.

Now let me collate two paragraphs—one in the affidavit of Duggan, which was filed on the 17th July, the 5th paragraph of that affidavit, and the second paragraph of District Inspector Murnane's affidavit, filed on the 17th October, 1908. Having regard to the fact, as deposed to by Mr. Murnane, that Mrs. Lillis kept her premises open down to the time that he, Mr. Murnane, points out, is not Duggan's affidavit somewhat meagre? One would think, from Duggan's affidavit, that Mrs. Lillis had not kept her premises open at all. Under her agreement she was bound to keep them "open as a public-house." I must say the 5th paragraph of Duggan's affidavit seems somewhat vague. Was it made to meet the same point made at Quarter Sessions, that the last removal was that of Mrs. Lillis? (See paragraph 5 of District Inspector Murnane's affidavit.) Is it not quite plain from the character of the agreement of the 8th February and from the *ad interim* transfer to her of that date and from Mr. Murnane's very specific affidavit, who no doubt appreciated the vagueness of Duggan's affidavit, that Mrs. Lillis did intend to keep and kept the premises open for nearly two months to about the time District Inspector Murnane states? And if she did so intend and kept the premises open—if there was a common intention—common to her and Macardle & Co., that she should trade, does not this circumstance make the observations made by Lord Justice Fitz Gibbon

(1) [1904] 2 I. R. 218.

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in *Brown* v. *Watson* (1), which have been referred to, wholly inapplicable to this case? Indeed, it is only necessary to refer to the learned Lord Justice's own words in *The King* (*Blackburn*) v. *Justices of Down* (2) to see that he did not intend to apply them to such a case as this. Here are his words:—"This Court has recently decided in *Brown* v. *Watson* (1) that it is not obligatory on an assignee, who does not himself desire to carry on the business, to obtain such an interim transfer, pending the assignment of the premises by him to another person."

Mrs. Lillis did intend to carry on business, and got an interim license to carry on business, and was in fact in actual possession for about two months, from the 8th February to about the 16th April. I refer to this, having regard to Mr. O'Connor's argument as to the meaning and effect of the word "upon," and to the alleged meaning he ascribed to Lord Justice Fitz Gibbon's observations in *Brown* v. *Watson* (1). Mr. O'Connor, as I undsrstood him, argued that the word "upon" might apply to the occasion when Rosina Maguire left the premises, because in the meantime it was not requisite for any one to take out an *ad interim* license, that Lord Justice Fitz Gibbon stated in *Brown* v. *Watson* (1):—"That the assignee of an executor, or a purchaser from assignees in bankruptcy, or from a previous assignee, or from the licensed person, may get such an interim transfer without any intervening license having been taken out."

But it is plain the Lord Justice meant by "a previous assignee" an assignee who was not in actual possession, and did not intend to carry on business, such as assignees by operation of law, such as personal representatives or assignees in bankruptcy, who had not taken possession, and did not intend to carry on business. This description most certainly did not apply to Mrs. Lillis, who had made a very special agreement to keep the house open as a public-house, who had taken out an *ad interim* transfer, and who remained in actual possession for about two months, having entered into possession under a very special agreement.

The 31st March, 1908, is the date of the next transaction. On that date Mrs. Lillis surrendered the premises and handed over

(1) [1904] 2 I. R. 218. (2) [1905] 2 I. R. 88.

the license, which has well been described as "the bit of paper." She then ceased to trade, and did not get her authority to carry on the business renewed at the next Quarter Sessions, which commenced on the 3rd April. Her authority to carry on the business therefore lapsed. She left the premises on the 16th April. Macardle & Co. did not get at any time an *ad interim* transfer, and there was no trade carried on between the 31st March, when Mrs. Lillis surrendered the premises, and the 25th April, when Duggan got out an *ad interim* transfer. In the meantime, on the 21st April, Macardle & Co. made a yearly letting to Duggan, to commence on the 1st May then next. What was granted to Duggan was a yearly tenancy direct from Macardle to Duggan. Now, then, how stands the title to the premises? Rosina Maguire's lease was gone; it was surrendered; it was extinguished. Mrs. Lillis's yearly tenancy was gone; it was surrendered and extinguished; and there was a new tenancy from year to year created by a direct letting from Macardle & Co. to Duggan. Mrs. Lillis had been assignee of no one. Nor was Duggan an assignee of anyone. He was a tenant from year to year to Macardle, and nothing else. What Duggan applied for on the 25th April was a transfer of the license held by Rosina Maguire. He requested—I quote the words of the certificate—"that he might be granted a transfer of the spirit license held by Rosina Maguire." (See certificate, dated 24th June, as to protection order granted to him on the 25th April.)

In my opinion there was no authority to grant that *ad interim* license. There was neither removal, sale, nor assignment within the meaning of 6 Geo. 4, c. 81, s. 21, or of 18 & 19 Vict. c. 114. To use the words of Lord Justice Fitz Gibbon in *The Queen* v. *Justices of Tipperary* (1), "The common title to both license and premises was interrupted." The license, according to the contention of the applicant, was still the personal privilege of Rosina Maguire, which was sought to be transferred to Duggan, and the premises were vested in him, not as assignee of Rosina Maguire, but as tenant from year to year from Macardle.

It was argued by the Solicitor-General before us that the

(1) 6 L. R. Ir. 129, at p. 136.

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applicant did not bring himself within the 1st section of the 18 & 19 Vict. c. 114; that there was no removal or assignment within the section; that "removal" meant removal of a *duly* licensed person who had been in possession; that this was Rosina Maguire, and that her "removal" was a thing past and gone—that the last removal was the removal of Mrs. Lillis, that she was not a *duly* licensed person, having, in fact, nothing but a protection order. I agree with this contention. If what Duggan applied for at Quarter Sessions, as distinguished from Petty Sessions, was a transfer of the license of Mrs. Lillis, she was not at any time a "duly licensed person"—indeed, the protection order which she got, not having been continued at the April Sessions, had lapsed.

Mr. O'Connor, who argued the case so vigorously before us, contended that the case came within the 1st section of the 18 & 19 Vict. c. 114. He contended that there were removal and assignment within that section. I do not think that any section was ever dealt with more exhaustively than section 1 of the 18 & 19 Vict. c. 114 was by Mr. O'Connor in the argument before us. After much debate on that section, I asked him what word would he prefer to rest his case upon—the word "removal," or the word "assignment." He took a night to consider the question, and the next morning he said he would prefer to rest his case on "removal." He did not shut himself out from or abandon "assignment," but he preferred "removal." The words of the section deal with an assignment of the "interest" of the licensed person, and there was no assignment of the *interest* of Rosina Maguire, of Mrs. Lillis, of the landlord, or anyone else. Rosina Maguire's interest in the premises was surrendered, extinguished; and how a tenant from year to year to the landlord under a new tenancy made to him directly could be the assignee of anyone I cannot see. I cannot regard Macardle & Co. as assignors and Duggan as assignee. I cannot disregard the words "his interest." I cannot ignore plain language. The removal referred to in 6 Geo. 4, c. 81, s. 21, and in section 1 of the 18 & 19 Vict. c. 114, means, as I have before indicated, the removal of the last person in possession. "Upon the removal," according to the English language, which I cannot disregard, means upon the removal of

the person in actual possession—there and then removing. If it does not mean this, how far back in point of time is the contemplated removal to be carried? Certainly not, in my opinion, to the time at which Rosina Maguire surrendered her interest and quitted possession. The word "upon" applies to death as well as to removal, and both words plainly, in my opinion, contemplate the death as well as the removal of the "duly licensed" person. It is when the duly licensed person "dies" or "removes" that the statute becomes operative, and not later. There must be, of course, a reasonable time allowed for the transaction of the business of transfer, such as is reasonable under all the circumstances of the case; but there must be no intervening transactions, such as the agreement with Mrs. Lillis in this case, and her taking possession under the agreement and trading, as she did, after she got the interim order of the 8th February, 1908. Mrs. Lillis's "removal" under the circumstances put the previous removal of Rosina Maguire *dehors* the section for the purposes of this case. Mrs. Lillis could not, having regard to *Deighan's Case* (1) and *Brown* v. *Watson* (2) in the Court of Appeal, be considered "a duly licensed person," but, in any case, it must be remembered that what Duggan applied for at Petty Sessions was a transfer of the license from Rosina Maguire, and not from Mrs. Lillis, who had surrendered both premises and license, and who was never "a duly licensed person."

Dumigan's Case (3) has no relevancy. There was no transfer whatever in that case. Dumigan he was and, as I said, Dumigan he remained. In *Dumigan's Case* (3) we held, under the circumstances of the particular case that the personal license which Dumigan got had not lapsed, that the personal privilege which he got remained with him until transferred from him by the proper authority, and that though he had for a time parted with the premises, yet that when he got back the lawful possession, having the license and the lawful possession of the premises, he was entitled to trade and not liable to prosecution. That was not a case of a license going away from a man who originally got it. It was a case of the identical premises coming back to the man who had got a license

(1) 31 I. L. T. R. 45. (2) [1904] 2 I. R. 218. (3) *Ibid.* 298.

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to trade in the selfsame premises. No doubt the tenure was different, the extent of the interest was different, but the premises were identical and held by a lawful title, and, whether rightly or wrongly, I endeavoured to show that the case did not come within the observations of Lord Justice Fitz Gibbon in *The Queen* (*O'Brien*) v. *Justices of Tipperary* (1) as to the severance between the license and the premises. We were much pressed with this passage to which I have referred in Lord Justice Fitz Gibbon's judgment. I will read it later on. I think it very relevant to this case.

We have been told that we should not extend *Clitheroe's Case* (2). There is a host of authority to this effect. *Clitheroe's Case* (2) has not been overruled (see *The Queen* v. *Justices of Cavan* (3)), but there is quite an anthology of disparagement of the decision in that case. Lord Morris stated that we should follow it where it "distinctly" applies, but extend its application in no way. Lord Justice Holmes plainly thought it was wrongly decided (see his judgment in the *Cavan Case* (3)); and Lord Justice Fitz Gibbon said that any attempted extension of its application would receive no encouragement. Lord Morris further stated in *Cox's Case* (4) that that case was not *quatuor pedibus* with *Clitheroe's Case* (2), and he would extend neither the policy, the logic, nor the principle of *Clitheroe's Case* (2): see *The Queen* v. *Recorder of Dublin* (2), where differentiating circumstances are referred to.

Now let us see how matters stood on the 17th June, 1908, when an application for a transfer was made to Judge Craig. Duggan, the applicant, came before him with an unauthorized *ad interim* license or authority. There was no removal, sale, nor assignment which would have justified the magistrates on the 25th April in granting that *ad interim* authority. There was no continuance of the authority granted to Mrs. Lillis. The *ad interim* authority to her had dropped. She was never a *duly* licensed person. See *Deighan's Case* (5); the words of the Chief Baron are given at page 119 of Mr. O'Connor's book. See also

(1) 6 L. R. Ir. at p. 136.
(2) I. R. 11 C. L. 412.
(3) 30 L. R. Ir. 137.
(4) 16 L. R. Ir. 436.
(5) 31 Ir. L. T. R. 45.

Brown v. *Watson* (1), at page 232, and *Dumigan* v. *Walsh* (2), at pages 307–9 and 310, and also page 312, where my brother Wright quotes the words of Lord Justice FitzGibbon. *Deighan's Case* (3), and *Brown* v. *Watson* (1), being decisions of the Court of Appeal, seem to me to overrule *Reg.* (*Oates*) v. *Chairman and Justices of Sligo* (4). Mrs. Lillis had then but a mere protection order, which lapsed. She surrendered the premises before the April Sessions, in which it was to be confirmed, and she never got it confirmed, and the title to the license and the title to the premises had become severed. In *Clitheroe's Case* (5) there were no such features as these. There was a continuous trading under a continuing authority, and there was no difficulty under 6 Geo. 4, c. 81, s. 21, nor under 18 & 19 Vict. c. 114, s. 1, as to removal, sale, or assignment. There was no severance of the title to the license and the title to the premises, a matter that must not be overlooked. If, as I said, the application at the Quarter Sessions, as distinguished from that at Petty Sessions, was an application for a transfer of Mrs. Lillis's so-called license, she was not a *duly* licensed person, and whatever she had she allowed it to lapse.

I said *in limine* that we should always bear in mind that what was asked for before Judge Craig was a "transfer." I find I said in *The Queen* (*Murphy*) v. *Justices of Cork* (6), at page 109 of the report, that a "transfer" was applied for; and under the head of transfer the case should be dealt with. In the same case the Lord Chancellor is reported to have said (see page 120):—"It lay, however, upon the applicant, in order to bring herself within the particular head of the licensing law under which she was applying, to show that she was a transferee within the transfer sections. The Acts relating to transfers contemplate (leaving out the case of death, which does not arise) the case of a person who gets by the act of the person removing from the premises an assignment of the interest of the licensed house followed by possession and occupation under it. I cannot find in this case either removal or sale or assignment. The question is not whether Ellen Murphy was in all events disqualified from getting

(1) [1904] 2 I. R. 218.
(2) *Ibid.* 298.
(3) 31 I. L. T. R. 45.
(4) [1901] 2 I. R. 352.
(5) I. R. 11 C. L. 412.
(6) [1895] 2 I. R. 104.

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a license, but whether she was entitled to claim it with special privileges as a transferee. The 6 Geo. 4, c. 81, and 18 & 19 Vict. c. 114 must receive their proper construction; and I cannot find any one of the cases there specified under which her application can range."

These observations of the Lord Chancellor are strictly applicable to this case. It will be noticed that he goes through, so to speak, the entire range of the Transfer Acts. Here it is suggested that we may somehow regard as immaterial what took place between the time Rosina Maguire left possession and the application in October. But let me see what the Chief Baron says as to the 6 Geo. 4, c. 81, s. 21. He says (at page 121):—"In my opinion there is evidence that the possession of the house was changed from the husband to the wife, and in that sense there was a 'removal' of the husband; but I think it clear that such removal was not a removal within the meaning of sect. 21 of 6 Geo. 4, c. 81, inasmuch as the appellant was not the assignee of her husband." He then refers to a pertinent passage on this point in the judgment of Mr. Justice O'Brien in *R.* v. *Justices of Tipperary* (1). Here, as I have stated, Duggan was not the assignee of anyone. Later on (at page 122), the Chief Baron says:—"I do not determine whether a person who *duly* obtained a transfer from the Justices at Petty Sessions under the 18 & 19 Vict. c. 114, or his assignee, is or is not entitled upon his application to the next Quarter Sessions to the benefit of the doctrine established by *Clitheroe's Case*" (2).

The Chief Baron speaks here of a person who *duly* obtained an *ad interim* order under the 18 & 19 Vict. c. 114. Duggan had not certainly *duly* obtained an *ad interim* order. Mr. O'Connor, in his excellent book, states the opinion of the profession when he says (at page 100):—"It seems that to take advantage of *Clitheroe's Case* (2), the applicant should obtain the temporary Petty Sessions transfer provided for by the 18 & 19 Vict. c. 114, or have been within that statute." Duggan in my opinion did not *duly* obtain this temporary transfer, because he was not, for reasons I have stated, within the statutes.

(1) 4 L. R. Ir. 259. (2) I. R. 11 C. L. 412.

Mr. O'Connor refers to many cases. He sets out at length the well-known passage in Lord Justice Fitz Gibbon's judgment in *The Queen* v. *Justices of Tipperary* (1). Lord Justice Fitz-Gibbon said :—" Where a licensed person holds licensed premises, with his concurrence, or on devolution of title from him, the license may pass with them by way of transfer." Now, Macardle & Co. were not licensed persons. They held " the bit of paper," but surely this did not make them licensed persons. As pointed out in *Dunigan's Case* (2), a licensed person, whether by way of transfer or otherwise, can be constituted such only by the Licensing Authorities. But Lord Justice Fitz Gibbon goes on : " But where the connection between the person and the premises is determined, and the common title to both license and premises is interrupted, I think the right of renewal or transfer is lost, and those claiming either on personal grounds, or as owners of the premises, must submit their claims to the Justices merely as applicants for new licenses."

This passage, in my opinion, puts an end to Duggan's claim for a transfer of Rosina Maguire's license, the thing which it was argued before us he was entitled to. The license *ex hypothesi* was in her. There was no assignment of her interest to Duggan. There was a mere tenancy from year to year under Macardle. This passage, which has been referred to in many cases, and in all the text-books in the country, puts an end to Duggan's claim *for a transfer* wheresoever made, whether at the next Quarter Sessions or the annual Licensing Sessions. This statement of the law expressed by Lord Justice FitzGibbon seems to be in keeping with the views of all the Judges who expressed themselves so emphatically to the effect that the doctrine laid down in *Clitheroe's Case* (3) should not be extended. As to " transferee," see what May, C.J., says in *The Queen* v. *Justices of Tipperary* (4 L. R. Ir. 262), towards the end of the page. See what Ball, L.C., says in the same case (1) as to " assignee " at the top of page 133, and see what Holmes, L.J., says, at page 116 of *The Queen* v. *Justices of Cork* (4), as to the grounds of the decision in *The Queen* v. *Justices of Tipperary* (1), namely, that the applicant, O'Brien, was not the

(1) 6 L. R. Ir. 129.
(2) [1904] 2 I. R. 298.
(3) I. R. 11 C. L. 412.
(4) [1895] 2 I. R. 104.

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assignee. Lord Justice Fitz Gibbon is reported to have said, in *The Queen* v. *Justices of Tipperary* (1), at page 136:—"Here the applicant must go further than the applicant in *Clitheroe's Case* (2), for he must show that if he applied for a transfer immediately after obtaining possession of the premises, he would have been within the 18 & 19 Vict. c. 114 (the Transfer Act)." In fact, Duggan was not a transferee within 18 & 19 Vict. c. 114, nor an assignee within 6 Geo. 4, c. 81, sect. 21.

It is said that Duggan, having somehow or other obtained an *ad interim* authority, he came fully equipped to Judge Craig—to Quarter Sessions. I cannot for a moment accept that. The *ad interim* order got by Duggan might, perhaps, protect him from prosecution by the police, but it would be a very strong proposition indeed to contend that an *unauthorized* protection order (if, indeed, a temporary transfer could in any case bind the Licensing Authorities at Quarter Sessions) was in any way binding upon the Licensing Authority, when an application for a transfer was made. That is to say, that error on the part of the magistrates is to stereotype error—that the error of the magisterial tribunal at Petty Sessions might infect, and might continue to infect, the Licensing Authority at Licensing Sessions. My brother Madden appears to me to deal satisfactorily with this matter towards the close of his judgment in *The Queen* (*Murphy*) v. *Justices of Cork* (3). He says:—"In the view, however, which I concur with the other members of the Court in taking of this case, it is unnecessary to decide this point, inasmuch as the licenses improperly renewed, even if valid for the protection of Edmond Murphy, ought not now to be acted upon by the Licensing Authority for the purpose of entitling the applicant to claim a transfer as his assignee."

What then, I ask again, was Duggan's position when he made his application to Judge Craig for a transfer on the 17th June? He was not a transferee of Rosina Maguire's license. The conditions requisite to enable the magistrates at Petty Sessions to transfer it were not present. If the application at Quarter Sessions (see paragraph 4 of District Inspector Murnane's affidavit) was for a transfer of a license held by Mrs. Lillis, she was not a

(1) 6 L. R. Ir. 136. (2) I. R. 11 C. L. 412. (3) [1895] 2 I. R. 104.

duly licensed person. See, as I have said, the 4th paragraph of the affidavit of Mr. Murnane, and see notice of application of Duggan to Quarter Sessions. I have already pointed out what the application at Petty Sessions was for. If Judge Craig's function was, as May, C.J., said in his judgment at p. 263 of *The Queen* v. *Justices of Tipperary* (1), to confirm, then there was nothing to confirm. If Duggan applied to Judge Craig, irrespective of the magisterial order, for an *ad interim* transfer, Duggan was not an assignee within the meaning of 6 Geo. 4, c. 81, s. 21. He brought himself neither within the 6 Geo. 4 c. 81, s. 21, nor the 18 & 19 Vict. c. 114. And then there had been a severance between the title to the license and the title to the premises. The license, as argued before us, remained in Rosina Maguire, and the premises had long since left her. To grant a transfer to Duggan under all the circumstances would be, in my opinion, a wholly unauthorized extension of *Clitheroe's Case* (2). The same considerations would apply in October. There was not, to use the words of the statute, anything to confirm. Duggan was neither properly equipped nor entitled to the transfer. No confirmation order could be made. The conditions warranting a transfer or renewal were not present.

But what really took place in October—what the County Court Judge really intended to do—appears from Mr. Winslow's second affidavit, the one sworn not on the 10th but on the 12th November: see 4th paragraph of the affidavit, where it is stated that Judge Craig said "he would give time to have the case argued before the King's Bench." What he plainly intended was to regulate his decision as to transfer according to the judgment to be given by us—to refuse the transfer, if we held he was right, to grant it if we thought it should be granted, and not to go into questions as to a "new license" until the question of the transfer had been disposed of, when it might, or might not, be requisite to go into it. This is manifest, and I think the learned Chairman intended what was obviously right and proper by himself, by this Court and the applicant, and by the Rector of the parish, who opposed. If there was anything in the order inconsistent with his

(1) 4 L. R. Ir. 259. (2) I. R. 11 C. L. 412.

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manifest intention, it is quite open to the Chairman on an appropriate application to amend it. A Judge has power to amend an order which does not represent his real intentions. A mandamus, if at all applicable, is not the only remedy.

I do not say that the entry of "no rule" as far as the application for a transfer was concerned was wrong. Under the circumstances it plainly meant "no rule for the present." There was no final statutory refusal where the ground of refusal must be stated—what was plainly intended was "no rule for the present" as regards the application for a transfer. I am certain that there was no question raised as to the technical propriety of the form used. No doubt the applicant or his advisers objected to the Chairman not entertaining the question as to transfer then and there, but I am certain not a word was said as to mere form. There was, in my opinion, under the circumstances, full discretion to do what was done as to the application for a new license, namely to postpone it.

With my brother Gibson's consent, the Court by a majority, including my brother Gibson, refuse the application for a *certiorari* and mandamus with reference to the order made in June, my brother Kenny dissenting. With reference to the October application, the Court being equally divided makes no rule. We award no costs.

Solicitor for the prosecutor: *B. L. Winslow.*
Solicitor for the Crown: *Malachi Kelly.*

J. L.

TOPPIN *v.* LORD MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF BELFAST (1).

Appeal.
1908.
Dec. 4.

(1908. No. 8058.)

Practice—Contributory negligence—Inevitable accident—Particulars—G. O. XIX., Rr. 6, 7.

Where, in an action for negligence, the defendant pleads contributory negligence, the Court will not compel him to give particulars of such plea, unless the plaintiff makes out a special case for the granting of particulars.

THIS was an action for personal injuries to the plaintiff, caused, as he alleged, by the negligence of the defendants' servants in the management of an electric tram-car. The plaintiff alleged that when crossing a street he was knocked down and injured by the tram, which approached at a high rate of speed and without warning.

The defendants traversed the several allegations in the statement of claim, and also pleaded that the injuries arose from inevitable accident, and that there was contributory negligence on the part of the plaintiff.

The defendants having declined to comply with a notice served by the plaintiff requiring particulars of the pleas of inevitable accident and contributory negligence, the plaintiff applied to a Divisional Court of the King's Bench Division (Gibson, Kenny, Dodd, JJ.) for an order for such particulars, which was granted. The defendants thereupon furnished the plaintiff with particulars of the plea of inevitable accident, and now appealed against so much of the order as directed them to give particulars of the plea of contributory negligence.

T. Harrison, for the appellants :—

The defendants should not be compelled to give particulars of

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

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the plea of contributory negligence, which is "a traverse of an allegation contained in the statement of claim": *Rattray* v. *Cork and Macroom Railway Co.* (1). *Martin* v. *M'Taggart* (2) was wrongly decided. In *Savage* v. *Kirk* (3) *Martin* v. *M'Taggart* (2) was cited, but the Court refused to order particulars to be given, on the ground that no special case was made out for such an order. In *O'Reilly* v. *M'Call* (4) Palles, C.B., followed *Martin* v. *M'Taggart* (2), but without approval. The proper principle is that particulars should not be ordered to be given unless a special case is made by the plaintiff showing that without the particulars he would be taken by surprise; and that has not been done here.

[*Wakelin* v. *London & South-Western Railway Co.* (5) was referred to.]

Hanna, for the respondent:—

The plaintiff is entitled to know what case he has to meet. For all he knows, the defendants' case may be that he was drunk on the occasion of the collision. If the defendants are merely relying on cross-examination to make out the plea, as was the case in *Lynch* v. *D. W. & W. Ry. Co.* (6), they should state so, but if they rely upon a substantive case of contributory negligence, the plaintiff is entitled to particulars.

THE LORD CHANCELLOR:—

We must follow our own decision in *Lynch* v. *Dublin, Wicklow, & Wexford Railway Co.* (6), which decided that, unless in special circumstances, a defendant who has pleaded contributory negligence will not be compelled to give particulars of such a plea. I have nothing to add to the judgment of Palles, C.B., in *Rattray* v. *Cork & Macroom Railway Co.* (1), in which I entirely concur. It is true that in *O'Reilly* v. *M'Call* (4), the learned Judge followed *Martin* v. *M'Taggart* (2) in preference to his own former decision, but evidently without approving of that case, as he

(1) 4 L. R. Ir. 386, at p. 389.
(2) [1906] 2 I. R. 120.
(3) 40 I. L. T. R. 82.
(4) 42 I. L. T. R. 15.
(5) 12 App. Cas. 41.
(6) In K. B. D.—40 I. L. T. R. 83, note.

invited an appeal to this Court. We must allow this appeal with costs.

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FITZ GIBBON, L.J. :—

I concur. In 1901 this Court decided in *Lynch* v. *Dublin, Wicklow, & Wexford Railway Co.* (1), that an order for particulars of contributory negligence should not be granted, unless the party applying made out "a special case" for such an order.

I wish to say for myself what I understand by a special case.

In the ordinary case of a collision between two vehicles, where negligence is alleged on the part of the defendant, and contributory negligence on that of the plaintiff, the only particulars which, speaking generally, the defendant could give of the contributory negligence would be to describe the occurrence, so as to show that the plaintiff was more to blame than himself. That is not "giving particulars"; and what Mr. Hanna insists upon as likely to cause difficulty, namely—that some evidence may be sprung upon the plaintiff for which he would not be prepared, is a danger just as great against the defendant as against the plaintiff, and the rule as regards a special case for giving particulars must apply equally to both parties.

There are special cases where the plaintiff might be required to give particulars of the alleged negligence, as, for example, where the defendant proves that he knew nothing of the alleged occurrence, or was unaware that anyone was hurt, until the service of the writ. Here there is no evidence that any charge is made against the plaintiff, except that he was the person to blame for the collision; and this not as an inference from any particular facts, but from all the circumstances of the occurrence, which are presumably known to both parties.

I think "a special case" means one in which the party can satisfy the Court that he is likely to be taken by surprise by some accusation or evidence which may be brought against him, and which he cannot be prepared to meet, unless he is told of it beforehand. Surprise may occur in some few cases, but while our decision will prevent the costs of a motion for particulars in

(1) In K. B. D.—40 I. L. T. R. 83, note.

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hundreds of cases, it will leave it open to the Judge, in any exceptional case of surprise, to adjourn the trial for the attendance of any necessary witness, or to take any other step necessary to prevent injustice.

HOLMES, L.J., concurred.

Solicitor for the appellants: *Frank Kerr.*
Solicitor for the respondent: *Edward Cooksey.*

R. ST. J. C.

ARTHUR CINNAMOND, CONTINUED IN THE NAME OF HELEN BATTY CINNAMOND, HIS EXECUTRIX, PLAINTIFF; WILLIAM JOHN M'CURDY, DEFENDANT (1).

K. B. Div. 1908. Nov. 11, 12, 16.

(1906. No. 12,105.)

Bankruptcy — Composition after bankruptcy — Provable debt — Unliquidated damages for breach of contract — Breach of covenant to repair — Continuing breach — Irish Bankrupt and Insolvent Act, 1857 (20 & 21 *Vict. c.* 60), *sect.* 149 — *Bankruptcy (Ireland) Amendment Act*, 1872 (35 & 36 *Vict. c.* 58), *sect.* 46.

Damages for breach of covenant to keep in repair do not constitute a provable debt unless and until assessed under section 46 of the Bankruptcy (Ireland) Amendment Act, 1872; and in the absence of such assessment the bankrupt lessee in whom the lease continues vested is liable for full damages for such breach, notwithstanding that the breach existed at the time of the bankruptcy, and that the lessee has carried a composition after bankruptcy, under sections 149 and 150 of the Irish Bankrupt and Insolvent Act, 1857.

Per Gibson, J.: *Quære*—Whether the lessor, not having been returned as creditor, and not having received any composition, would in any case be bound. *Quære*, also, Whether section 46 of the Act of 1872 applies to a continuing breach where the lease continues to be vested in the bankrupt lessee, and whether the lessor's right to recover full damages could be thereby affected.

Per Kenny, J.: Even if the damages that accrued up to the time when they could be assessed in the bankruptcy proceedings were a provable demand, the lessee would not be discharged from future liability where the breach of covenant was a continuing one.

Hardy v. *Fothergill* (13 App. Cas. 351) discussed and distinguished.

MOTION to set aside verdict and judgment for the plaintiff, and to enter verdict and judgment for the defendant, or, in the alternative, for a new trial.

The action was originally brought by Arthur Cinnamond, who died in the course of the proceedings, which were continued in the name of Helen Batty Cinnamond, his executrix. The action was for damages for breach of covenant to repair, and keep in repair,

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and KENNY, JJ.

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buildings, contained in an indenture of fee-farm grant dated the 7th March, 1904, and made between Arthur Cinnamond of the one part, and the defendant of the other part, by which, for the considerations therein mentioned, Arthur Cinnamond granted to the defendant, his heirs and assigns, a bleach green, bleach mills, and works, at the yearly rent therein-mentioned. In the fee-farm grant there was contained a covenant by the defendant with Arthur Cinnamond to repair and keep all buildings at any time on the premises in good, substantial, and tenantable order, repair, and condition.

In the month of September, 1905, certain buildings on the premises comprised in the fee-farm grant were destroyed by fire, and were not restored by defendant.

On the 15th December, 1905, the defendant was adjudicated bankrupt by the Judge of the Belfast Local Bankruptcy Court, of which bankruptcy and all subsequent proceedings therein Arthur Cinnamond had notice, but did not prove any claim for damages in respect of the breach of the covenant in question, although he proved in respect of another claim. On the 2nd July, 1906, the defendant carried, with the approval of the Local Bankruptcy Court, a composition after bankruptcy with his creditors, the amount of which was afterwards paid to the creditors, including Arthur Cinnamond, in respect of the claim for which he proved, and the bankruptcy of the defendant was annulled by order dated the 29th October, 1906. Arthur Cinnamond had not been returned as a creditor in respect of the damages now claimed, and did not receive any composition on foot of such damages.

The action was tried before Mr. Justice Wright and a special jury of the City of Belfast, at the July Assizes, 1908, when the above matters were proved or admitted, and further evidence given not material for the purposes of this report, being mainly directed to the question of the amount of damage sustained.

Counsel for the defendant asked for a direction, contending that the remedy on the covenant was gone by reason of the bankruptcy of the defendant after the breach of covenant had occurred in the lifetime of the original plaintiff, Arthur Cinnamond, who had notice of the bankruptcy, and made no claim on foot of the covenant in that bankruptcy matter. Mr. Justice Wright declined

to direct. The jury found for the plaintiff, and assessed the damages at £700, and the Judge gave judgment for the plaintiff for that amount with costs.

Ignatius O'Brien, K.C. (with him *Devitt*), for the defendant:—

Under section 149 of the Irish Bankrupt and Insolvent Act, 1857, where a composition after bankruptcy is carried, and the adjudication annulled, every creditor of the bankrupt is bound by the composition. The damages recoverable in respect of the breach of covenant at the date of the adjudication were the same as those sought to be recovered in the present action. These damages could have been proved for in the bankruptcy matter, and the claim in respect of them is therefore now barred by the composition: Bankruptcy (Ireland) Amendment Act, 1872, s. 46; Irish Bankrupt and Insolvent Act, 1857, ss. 58, 257; *Hardy* v. *Fothergill* (1). A creditor having notice of the proceedings, and failing to put in a claim, must be taken to be in the same position as if he had proved.

Even assuming that some damage has been suffered between the date of the adjudication and the bringing of the present action, and that an action lies for such, the damages recoverable would be only nominal, and the verdict for £700 could not be sustained. The case would be the same as if there had been a second action after a previous one, in which the whole amount of the actual loss up to then had been recovered.

[He referred to *In re Kelly* (2), *Foott* v. *Benn* (3).]

Gordon, K.C., and *M'Ilroy*, K.C. (with them *Hanna*), for the plaintiff:—

The breach of covenant here is a continuing breach: *Maddock* v. *Mallett* (4). The landlord may select his own time to bring the action. He is not bound to prove in the bankruptcy proceedings. Take the case where the dilapidations were wholly unknown to the landlord; could it be contended that his claim would be barred by the composition? In the case of unliquidated damages for

(1) 13 App. Cas. 351.
(2) 6 Ir. Jur. (N. S.) 258.
(3) 18 Ir. L. T. R. 90.
(4) 12 Ir. C. L. R. 173.

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breach of contract there is no provable debt until the damages have been assessed under section 46 of the Act of 1872. That section was copied from section 153 of the English Bankruptcy Act, 1861, the decisions upon which show that, the section being an enabling section for the benefit of the creditor, he is not bound to come in under it, and that unless and until his claim has been assessed under the section there is no debt provable in bankruptcy, and the creditor is not therefore barred by the composition deed: *In re Penton* (1); *Sharland* v. *Spence* (2); *Robertson* v. *Goss* (3); *Ex parte Wilmot* (4); Williams on Bankruptcy (9th ed.), p. 129. *Hardy* v. *Fothergill* (5) is not in point. The claim there was by the lessees against the assignees of the lease upon an indemnity given by the assignees. The case has no application as between lessor and lessee of an existing lease: *In re New Oriental Bank Corporation* (*No.* 2) (6). Moreover, the case was decided under section 31 of the English Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), by which all liabilities, including all possible claims in respect of breach of contract, whether present, future, certain, or contingent, were declared to be debts provable in bankruptcy. This section differs altogether from section 46 of the Act of 1872, by which the demand is not provable until assessed.

Ignatius O'Brien, K.C., in reply.

Cur. adv. vult.

Nov. 16.

LORD O'BRIEN, L.C.J.:—

Arthur Cinnamond, the original plaintiff in this case, demised to the defendant, by way of fee-farm grant, certain houses and premises; and the fee-farm grant which was executed contained a covenant on the part of the defendant to repair and keep in repair. The defendant did not fulfil his covenant, and the plaintiff brought an action for its breach against the defendant. The damages were assessed by the jury who heard the case at £700. The defendant, some considerable time before the trial, namely, on the 15th December, 1905, had become bankrupt.

(1) L. R. 1 Ch. App. 158.
(2) L. R. 2 C. P. 456.
(3) L. R. 2 Ex. 396.
(4) L. R. 2 Ch. App. 795.
(5) 13 App. Cas. 351.
(6) [1895] 1 Ch. 753.

and had some time also before the trial carried a composition with his creditors. Notice of the bankruptcy, and of the proposed composition, was served on the plaintiff, who took no step so far as the present claim is concerned, with reference to bankruptcy or composition.

The action was conversant substantially with damages that accrued before bankruptcy, having been caused by a fire which took place before bankruptcy; and Mr. T. J. Campbell, who appeared for the defendant, asked the learned Judge to direct a verdict for the defendant, contending that the remedy on the covenant was gone by reason of the bankruptcy of the defendant after the breach of covenant had occurred in the lifetime of the original plaintiff, Arthur Cinnamond, who had notice of the bankruptcy, and made no claim on foot of the covenant in that bankruptcy matter. The learned Judge refused to comply with this requisition. Was he right in so doing? We think he was.

I am opinion that nothing is provable in bankruptcy, or included in such a composition as that carried by the debtor in this case, except debts strictly so called, or liquidated sums rendered so by assessment in the prescribed manner—in the way recognized by the 46th section of the Bankruptcy (Ireland) Amendment Act, 1872.

One's early notions were that nothing could be proved in bankruptcy, or released by composition in arrangements, but a debt. However, Mr. O'Brien contended that if there was a liability to pay damages, as distinguished from a liquidated sum ascertained to be due in respect of damages, this was sufficient. He cited *Hardy* v. *Fothergill* (1). This is, no doubt, an important case; and if the Act of Parliament upon which it rested applied to this country, I am far from saying that Mr. O'Brien would not have maintained his case. The facts of that case no doubt were different; but the language of the Act was very wide, including the expression *liability to damages*, and the language of Lord Selborne and Lord Macnaghten gave to the words of the statute a very wide and general application. Now, if there was a recurrent liability, that is to say, if there was a continuing contract, and a

(1) 13 App. Cas. 351.

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liability to pay such damages as accrued from time to time, it might be argued that the plaintiff would be precluded from recovering such damages as accrued before the bankruptcy, because this would be a liability to damages capable of being ascertained by a jury or a Judge. But, however this may be, the Act of Parliament—the English Act of 1869—upon which *Hardy* v. *Fothergill* (1) was founded, does not apply to Ireland. What then is the relevant statutory provision here? I think the 46th section of the Act of 1872 governs the matter. That section deals with claims for unliquidated damages. This is plain from the language of the section, altogether independently of the marginal note. It states in so many words that damages such as we have here, when assessed by a jury, or assessed with the consent of the parties by the Judge of the Bankruptcy Court, shall be provable as if they were a debt due at the time of the bankruptcy or arrangement. Assessment is made a condition precedent to proving in bankruptcy or arrangement; and here there was no assessment by Judge or jury which rendered any damage that may have accrued provable as a debt. It is plain from the 58th section of the Act of 1872 that what bankruptcy deals with and discharges from are debts arising directly from contractual obligation, or debts which have been made good by assessment by Judge or jury. Arrangements in bankruptcy by composition deeds deal with the same subject-matter. The word "creditor" in the 149th section of the Act of 1857, to which Mr. O'Brien referred, means a creditor in respect of a debt strictly so called. Indeed, the following section of the same Act, namely, the 150th, speaks expressly of debts, and deals exclusively with them; and the 46th section of the Act of 1872 deals with damages which become provable as if debts, by following the procedure therein prescribed, which was not followed.

Before I conclude I desire to recur to an observation I made more than once during the argument. It was this. The intention of the Bankruptcy Acts—an intention often ascribed to them by very distinguished Judges—was to give the bankrupt a fresh start—to free him from all liability. There was an opportunity

(1) 13 App. Cas. 351.

given to the creditor by the 46th section of the Act of 1872, to make all obligations for unliquidated damages provable in bankruptcy by assessing damages as therein pointed out. Could, say, a landlord, a lessor, when it was open to him to come in and prove and thereby get a dividend, remain outside the 46th section, and by not availing himself of the opportunity thereby afforded, keep hanging over a lessee or assignee what might be a crushing liability—a liability which, by reason of its amount, might render a composition deed quite useless by taking away the funds upon which it was based—funds, assets, by the application of which a debtor hoped to discharge the amount compounded for and secured by the composition deed? Could, say, a landlord come in and prove in the way indicated, and get a dividend, or could he refuse to come in, and claim the entire amount for which a tenant was liable in damages, though the amount for which the tenant or his assignee was liable might by its realization absorb the whole fund liable for the composition debts? After some fluctuation of opinion, I think it is open to a lessor under such circumstances not to proceed under the 46th section. I think it is open to a lessor to remain without the 46th section, and claim by action outside bankruptcy the full amount due to him for unliquidated damages—and the reason why I entertain this opinion is this—a lessor has a common-law right to sue for any liquidated damages which may accrue to him, and certainly there are no express words in the Act of Parliament depriving him of this right, nor can there be derived from the bankruptcy statutes any clear intimation that he is deprived of such right. A common law right can be lost only by express language or clear implication. There are no express words here or any such clear implication. On the whole case I think the learned judge was right.

GIBSON, J.:—

The question in this case is whether an adjudication in bankruptcy, followed by composition and annulment of the adjudication pursuant to sects. 149 and 150 of the Act of 1857, is an answer to any and what extent to an action by the landlord for continuing breach of a covenant to repair, originating before bankruptcy, brought against the bankrupt tenant, in whom the

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premises have been continuously vested, the landlord not having been returned as creditor, and not having received any composition on foot of such damages, which were never assessed and made provable pursuant to sect. 46 of the Act of 1872. Apart from this latter enactment, it is certain that the landlord was not a creditor under sections 149 and 150, or under the arrangement sections, or any part of the Act of 1857; unliquidated damages did not constitute a debt, and the statute only deals with persons who are creditors or constructively made such. Even if the plaintiff was to be deemed a creditor, is it quite clear that, not having been returned as such, and not having got any composition, he is bound? A bankruptcy composition differs no doubt from an arrangement in its publicity through the *Gazette*, and in other features. Still there is a certain similarity. Section 149 is very different in character from sect. 28 of the English statute of 1869. Under sects. 149 and 150, a creditor not paid his composition is remitted to his original rights: *Erskine* v. *Moreland* (1); just as he would be in an arrangement. The breach of contract resulting in damages might be unknown to the party prejudiced, as in case of an internal alteration of the premises amounting to waste, or in case of a breach of covenant for title in a conveyance. Here, no doubt, the landlord was aware of the bankruptcy and proved for a small debt, but he never was treated by the bankrupt, or acted, as creditor in respect of the damages on the covenant to repair. This point has not been discussed, and I will assume that if the landlord's claim for damages constituted a provable debt, such debt would have been barred.

Whether he had such debt depends on whether section 46 of the Act of 1872 has brought the plaintiff into section 149 of the Act of 1857, and made him a creditor within that enactment. The 46th section deals with liability for unliquidated damages for breach of contract at the date of adjudication or arrangement petition, and enables the Court to assess such damages, which after assessment are made provable *as if* a debt due at the time of the bankruptcy or arrangement. The bankrupt, as well as the claimant, can apply for such assessment.

(1) I. R. 10 C. L. 243.

Without such assessment there is no provable debt; without a proved debt no creditor can vote on composition or arrangement: *Ex parte Pearce* (1). The reference to arrangement in section 46 makes the meaning clear. There can be no protection in an arrangement unless the creditor has notice: *Wesson* v. *Allcard* (2), and unless the debt is satisfied: *Jeffries* v. *Onions* (3). The omission of the creditor in insolvency or arrangement left him free. A certificate under section 64 was no protection in an arrangement if the statutory conditions were not satisfied: *Breslauer* v. *Brown* (4). It is argued that the plaintiff was bound to have the assessment made, and, not having converted his damages into a provable quasi-debt, he has lost any claim to damages subsisting at the date of adjudication. I cannot agree. The bankrupt could have applied for an assessment; he could only have done so by admitting the breach, and the assessment might have delayed the composition meetings. As Lord Cairns observes in *Ex parte Wilmot* (5), "It is not until that process [assessment] is gone through, that the term 'proof,' or the term 'debt,' or the term 'creditor,' can be used with reference to unliquidated damages." See also *Sharland* v. *Spence* (6), *Robertson* v. *Goss* (7). There is nothing in section 46, or the other sections, to impress on a person claiming unliquidated damages the character of creditor by estoppel as a consequence of his not having had his damages assessed. I have already pointed out that breach of contract and damage therefrom might be known only to the bankrupt; and as the section contemplates undisputed damages, the bankrupt if he wants relief should admit liability and himself apply. Sections 149 and 150, with General Order 128, refer only to creditors—not to persons claiming damages. Section 150 draws distinctions between creditors for £20 and £50, and can only be applied to ascertained liquidated debts. In the case of unassessed damages the section could not be carried out. Section 58 was relied on, as it uses the word "liability," but the expression, on the context, cannot extend

(1) 13 Ch. D. 262.
(2) 8 Ex. 260.
(3) 13 L. T. (N. S.) 606.
(4) 3 App. Cas. 672.
(5) L. R. 2 Ch. at p. 807.
(6) L. R. 2 C. P. 456.
(7) L. R. 2 Ex. 396.

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the words "debt" and "creditor" in the Act of 1857, to all liabilities. Our code contemplates debts actual or contingent in the ordinary sense, or debts made such by express statutory provisions.

If the words "it shall be lawful" give the Court a discretion, so that an application to assess could be refused, this would be strong in the same direction. The omission by the person whose contract was broken to make an application which for various reasons might be refused, could hardly be deemed to fix him with the character of creditor. In the case of a continuing breach (if such breach is within section 46, which is confined to damages at the time of adjudication), the Court might decline, if it had a discretion, to sever the damages by a separate and inconvenient assessment; or it might, in view of the delay consequent on having the damages assessed—a process sometimes raising points of difficulty—refuse to assess lest the composition should fall through; or there might be a question as to the breach being admitted. These elements of uncertainty would be less if the bankrupt made the application. The onus is on the bankrupt: *Breslauer* v. *Brown* (1).

My conclusion, that the plaintiff is not within sect. 149, as amended by sect. 46 of the statute of 1872, disposes of the case; but I add a few remarks on other points discussed. *Hardy* v. *Fothergill* (2) has no bearing on the question before us. That decision was based on sect. 31 of the Act of 1869, which for some reason was not taken into our amending statute of 1872. By that section all "liabilities," defined therein in the widest sense, were to be deemed to be debts provable in bankruptcy. Further, the case was one of indemnity, and the damage had to be proved once for all. Where a lease continues to be vested in the bankrupt, and has not been disclaimed or otherwise determined, payment of a dividend could not discharge future liabilities, and thereby enable the bankrupt to enjoy the leasehold thenceforward free from rent, &c. The requisition of defendant's counsel for a general direction was, in any view, untenable. As sect. 46 is confined to damages at date of adjudication, it could not by any possibility protect in respect of subsequent breaches.

(1) 3 App. Cas. 672. (2) 13 App. Cas. 351.

There was much argument as to whether sect. 46 in any view could affect the plaintiff's right to recover damages on the continuing breach, especially as he had in point of fact received nothing. If the defendant had not been direct lessee, and had only been assignee, or if the lease had been assigned, I think that against the lessee in the former case, if not discharged under sect. 16 of Deasy's Act, and against the assignee in the latter case, full damages, notwithstanding sect. 46, could have been recovered on foot of the continuing breach. Whether the bankrupt personally might or might not be in a better position notwithstanding that he continues tenant and has the benefit of the lease, and whether sect. 46 extends at all to a continuing breach in respect of a lease remaining vested in the bankrupt, I leave for future decision, as the plaintiff not being a "creditor" and not being bound, the point does not now arise. *Taylor's Case* (1), discussed in *Bettley* v. *Stainsby* (2), has some bearing on the point.

With regard to English authorities, great caution must be exercised in using them, as even where some of the enactments are like ours, there are often other material sections, not occurring in our legislation, by which the decisions have been influenced. Thus, sect. 153 of the English statute of 1861 is the foundation of sect. 46 in our Act; but the discharge section in the Act of 1861 is much wider than sect. 58. The only safe course is to keep attention fixed on the language and plan of our own statutes, framed on an inconvenient piecemeal system. The tendency of legislation has been in favour of the bankrupt; but the Irish statutes are far behind the English in that respect, and we must adhere to the fixed principle established by an unbroken line of decisions in bankruptcy law that common-law rights cannot be interfered with or extinguished without clear statutory authority. As the plaintiff was not a "creditor" in bankruptcy, any more than he would have been in an arrangement, there is no answer to the action.

(1) 3 B. & Ald. 521. (2) 12 C. B. (N. S.) 477.

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MADDEN, J.:—

Before the passing of the Bankruptcy (Ireland) Amendment Act of 1872, liability to a demand in the nature of unliquidated damages was not, in Ireland, capable of being converted into a debt provable in bankruptcy. A person having a claim of this kind, unless he obtained judgment before bankruptcy, was precluded from sharing in the distribution of assets, while, on the other hand, the bankrupt was unable to obtain relief from such a liability by certificate or discharge. The tendency of modern legislation has been (as pointed out by Blackburn, J., in *Kellock* v. *Enthoven* (1)) throughout the different Bankruptcy Acts, "by enlarging the sphere of proof to enlarge the description of persons who are classed as creditors."

The 46th section of the Act of 1872 operates in the manner indicated by Blackburn, J., by enlarging the sphere of proof. This section is copied from the 153rd section of the English Act of 1861. In commenting on this section Bovill, C.J., remarked (*Sharland* v. *Spence* (2)):—"That section for the first time makes claims for unliquidated damages provable in bankruptcy, and its provisions are, I think, for the benefit of the creditor, and enable him to prove his claim, if he chooses, under certain conditions." The learned Chief Justice did not, by these words, mean to describe this section as one enacted in the interest of the creditor alone, for it is plainly in the interest of the debtor that he should be afforded the possibility of obtaining, under certain circumstances, discharge from a liability of this kind. But he laid down the principle which has been followed in subsequent cases, and which is stated in the text-book to which we have been referred (Williams on Bankruptcy), that it rests with the person who has a demand against a debtor for unliquidated damages, to determine whether or not he will convert his position into that of a creditor having a debt provable under the bankruptcy, by complying with the provisions of the 46th section. Any other conclusion would be, in my opinion, inconsistent with the system of bankruptcy law. The bankrupt is bound to make a full disclosure of his affairs, and elaborate precautions are taken to secure that all possible claimants

(1) L. R. 8 Q. B. 458, at p. 465. (2) L. R. 2 C. P. at p. 459.

shall have notice of the bankruptcy. But the initiative of proof rests with the claimant. In my opinion this proposition applies to a claimant availing himself of the provisions of this section, while the debtor can do his part towards putting the section into operation by admitting the breach, and thus rendering the question for decision one for assessment of damages. The question as to any person who does not come in under the bankruptcy is, in each individual case, Had he a debt "provable under the bankruptcy"? If so, the certificate of conformity operates as a release to the bankrupt, under the provisions of the 58th section of the Act of 1872. But if the liability is something other than "a debt provable under the bankruptcy," neither party derives any relief. The claimant receives no dividend, and the bankrupt no discharge.

It is evident that, in a number of cases, it would be in the interest of a claimant that a demand for unliquidated damages should be converted into a debt capable of ranking for dividend, while in other cases, where there was a continuing liability, unaffected by the Statute of Limitations, a claimant might prefer to postpone the time of asserting his right. For the purpose of providing for the former class of cases the section vests in the Court a jurisdiction which it did not formerly possess, by enacting that it should be lawful for the Court to direct such damages to be assessed by a jury, or by consent of the parties to assess the damages itself. The reference to damages which have not been, and cannot be, otherwise liquidated or ascertained, is somewhat obscure. But the words of the section which are material for the purposes of the present case are perfectly clear. It is only when the amount of damages has been assessed that the claim becomes provable as if a debt due at the time of the bankruptcy or arrangement.

The cases referred to by Mr. M'Ilroy—*In re Penton* (1) and *Ex parte Wilmot* (2)—involved the consideration of the application of the corresponding section of the English Act of 1861 (section 153) to trust deeds for the benefit of creditors. But there are important observations in some of the judgments which are

(1) L. R. 1 Ch. App. 158. (2) L. R. 2 Ch. App. 795.

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applicable to the operation of this section in bankruptcy, particularly the following passage in the judgment of Lord Cairns in *Ex parte Wilmot* (1):—"The 153rd section, no doubt, makes a provision for the ascertainment of damages upon a claim for unliquidated damages, and a person having established such a claim is called a creditor, but it is not until that process has been gone through, that the term 'proof,' or the term 'debt,' or the term 'creditor,' can be used with reference to unliquidated damages." In the present case it is only necessary to say that the process prescribed by section 46 has not been gone through, with the consequence that the claim of the plaintiff in this action was never converted into a debt provable in the bankruptcy, for which the bankrupt obtains relief under the 58th section of the Act.

KENNY, J.:—

I may express my view very shortly.

The breach of covenant in respect of which this action was brought is a continuing one. The plaintiff might, had he chosen to do so, have obtained in the bankruptcy matter an order for the assessment of damages up to that period, and after having the amount so assessed might have proved for it as if it had been a debt (46th section, Act of 1872). But until these steps were taken there was no provable debt. The 46th section of the Act of 1872 was an enabling one—enacted for the benefit of creditors—which the obligee of the covenant might or might not have availed himself of. If he did avail himself of it, the amount of the damages became a *quasi*-debt, and, being thus rendered provable, would have been released by the certificate of conformity. If he did not avail himself of it, the liability on foot of the breach in respect of which damages might have been assessed remained in my opinion undischarged. I therefore concur in thinking that the defence of discharge by the composition and annulment of the bankruptcy is not open to the defendant, and that the verdict should stand.

I may add that even if the damages that accrued up to the

(1) L. R. 2 Ch. App. 795, at p. 807.

time when they could have been assessed in the bankruptcy proceedings were a provable demand, the defendant would not, in my opinion, be discharged from future liability, as the breach of the covenant is a continuing one, and an action like the present would be sustainable.

Solicitors for the plaintiff: *Carson & M'Dowell.*
Solicitor for the defendant: *W. K. Gibson.*

J. G. T.

THE COUNTY COUNCIL OF KILDARE *v.* THE KING (1).

April 23, 24, 28, 29. May 18.

Petition of Right—Grant from Parliament—Moneys of the subject in the hands of the Crown—"The King can do no wrong"—Irish Land Act, 1903—*Losses on the flotation of stock—Land Purchase Account—Constituent parts of Guarantee Fund—Development Grant—Death Duty Grant—Agricultural Grant—Order in which recoupment of flotation losses to be borne—Purchase of Land (Ireland) Act*, 1891—*Local Government (Ireland) Act*, 1898, *ss.* 48 (1) (2), 49—*Labourers (Ireland) Act*, 1906, *s.* 15—*Lord Lieutenant—Treasury Rules.*

In the financial years ending 31st March, 1906, and 31st March, 1907, there had been deducted from the grants to County Councils in Ireland the sum of £73,218 12*s.* 5*d.*, being the sum of £65,677 12*s.* 4*d.* deducted from the Death Duty Grant, and the sum of £7541 0*s.* 1*d.* deducted from the Agricultural Grant. From the shares of these grants to which the County Council of K. was entitled, the deductions made were—for the year 1906, the sum of £1698 0*s.* 3*d.*, and for the year 1907, £6766 12*s.* 6*d.*, making together the sum of £8464 12*s.* 9*d.*, whereof £2957 8*s.* 3*d.* had been withdrawn from the Death Duty Grant, and the sum of £5507 4*s.* 6*d.* from the Agricultural Grant. These deductions had been made in pursuance of certain statutory provisions of the Land Purchase (Ireland) Acts, enabling deductions to be made from the grants for the purpose of recouping losses incurred in the working of the finance of the Land Purchase Acts.

The County Council of K. filed a Petition of Right, in which it was submitted that these deductions were illegal, and not authorized or warranted by the Land Purchase (Ireland) Acts, or any statutory or legal authority.

(1) Before PALLES, C.B., and ANDREWS, JOHNSON, and KENNY, JJ.

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The deductions were made on the ground that under sect. 29 (2) of the Irish Land Act, 1903, the Guarantee Fund was liable to make good any deficiency in the income account of the Irish Land Purchase Fund, and that, so far as these deficiencies were caused by the issue of Guaranteed Land Stock at a discount, the Irish Development Grant, as one of the constituent parts of the Guarantee Fund, was first to be charged, under section 38 of the Act of 1903, so long as it was able to meet them; but that there were other deficiencies in the income account with which the Local Taxation Grants, as constituents of the Guarantee Fund, were directly chargeable, and that these deficiencies arose from the following causes:—(1) arrears from the payment of purchase annuities, £9119; (2) unearned dividends in issue of stock, £23,750; (3) advance dividends, £13,650; (4) interest due but not received, £15,500; (5) unproductive balances, £8977. The petition took exception to items (2), (3), and (5) of the foregoing deductions, and charged that the Development Grant had not been duly applied under the provisions of the Irish Land Act, 1903, but had been devoted to other purposes, with the result that the Death Duty Grant and the Agricultural Grant had been improperly charged with sums which should have been paid primarily out of the Development Grant portion of the Guarantee Fund. It was also submitted that the dividends and sinking fund on two millions of "excess stock," issued to make good the loss occasioned by the Guaranteed Land Stock being issued at a discount, if chargeable at all against the Land Purchase Fund or Guarantee Fund, should be made good out of the Development Grant before the Death Duty Grant and Agricultural Grant could be resorted to. It was further submitted that the sum of £50,000 payable out of the Irish Development Grant to the income account of the Irish Land Purchase Fund for the financial year ending March 31, 1907, had been improperly withdrawn therefrom, and that up to March 31, 1905, a sum of £156,000 had been paid from the Irish Development Grant into the income account of the Irish Land Purchase Fund, under the provisions of section 38 of the Irish Land Act, 1903; according to a statement of the Secretary of the Treasury, the unexpended balances of money from the Irish Development Grant should, under the provisions of section 15 of the Labourers Act, 1906, be used as a working balance, and should not be reckoned as part of the income of the Land Purchase Fund in determining whether that income was sufficient, under section 29 (2) of the Irish Land Act, 1903. The sum of £98,000, the amount of the working balance, included the sum of £50,000 payable from the Development Grant for the financial year ending March 31, 1907, and it was submitted that this sum was not, upon the true construction of section 15 of the Labourers (Ireland) Act, so applicable, and out of the sum of £98,000 only such portion thereof (if any) as represented moneys transferred from the Irish Development Grant prior to March 31, 1906, and which remained then unexpended, were applicable for the purpose of such working balance, and all moneys payable or paid from the Development Grant, under section 38 of the Irish Land Act, 1903, after March 31, 1906, should have

been paid to, and reckoned as forming part of, the income account of the Irish Land Purchase Fund. It was further submitted that Statutory Rules 10 and 23 of the 24th November, 1904, were *ultra vires* and void; that the whole of the Death Duty Grant should be exhausted before the Agricultural Grant was resorted to, and that there was no power, after the closing of the accounts for the financial year ending March 31, 1906, to re-open them, and charge the County Councils with any of the deficiencies:—

Held, that the suppliants' right to the moneys was founded upon grant, and not upon contract, but that the moneys were, nevertheless, the moneys of the suppliants in the hands of the Crown, and were a proper subject of Petition of Right. The principle that the King can do no wrong is no answer to a Petition of Right to recover from the servants of the Crown moneys to which the suppliants are entitled under a grant.

Held, also, that section 6 (6) of the Purchase of Land (Ireland) Act, 1891, by which all questions arising as to the share of any county, &c., in any fund or sum dealt with in that Act shall be dealt with by the Lord Lieutenant, did not preclude the Court from determining the questions raised by the Petition.

Held, also, that none of the objections in the Petition could be sustained; that upon the meaning of the word "deficiency" in section 38 of the Irish Land Act, 1903, the entire capital loss incident to the issue of stock at a discount might be met by the creation of stock, instead of paying it out of the Irish Development Grant, so far as it would stand; that the deductions under the heads of "Unearned Dividends on Stock" and "Advance Dividends" were duly authorized; that under the head "Unproductive Balances," if there were default by the servants of the Crown, the same could not be imputed to the Sovereign, so as to make them an appropriate subject-matter for a Petition of Right; that the objection to the validity of the Treasury Rules was not maintainable, and that the £50,000 payable out of the Development Grant for the financial year ending 31st March, 1907, was properly appropriated as part of the "working balances" specified in section 15 of the Labourers (Ireland) Act, 1906, and not as part of the income account of the Irish Land Purchase Fund.

PETITION OF RIGHT presented by the County Council of the County of Kildare to raise certain questions as to the withdrawal of sums of money from the Local Government Taxation (Ireland) Account to meet losses in the working of the finances of the Land Purchase Acts.

The Petition of Right was as follows:—

1. Your suppliants, as County Council of the County of Kildare, are entitled to be paid or to receive each year the

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prescribed shares payable to the County of Kildare in (*a*) the Agricultural Grant payable out of the Consolidated Fund under sect. 48 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37); and (*b*) the Death Duty Grant, formerly termed the Irish Probate Grant, payable by the Commissioners of Inland Revenue, pursuant to the provisions of the Probate Duties (Scotland and Ireland) Act, 1888 (51 & 52 Vict. c. 60), as amended by sect. 19 of the Finance Act, 1894 (57 & 58 Vict. c. 30). The Death Duty Grant to the County of Kildare has hitherto amounted annually to the sum of £5914 16*s.* 6*d.* or thereabouts, and the Agricultural Grant to the sum of £15,740 10*s.*

2. For the financial years ending 31st March, 1906, and 31st March, 1907, there have been deducted from the grants to the County Councils of Ireland the sum of £73,218 12*s.* 5*d.*, being (*a*) the sum of £65,677 12*s.* 4*d.* deducted from the Death Duty Grant; and (*b*) the sum of £7541 0*s.* 1*d.* deducted from the Agricultural Grant. From the shares in the said grants to which your suppliants are entitled the deductions are as follows:—For the year 1906, the sum of £1698 0*s.* 3*d.*, and for the year 1907 £6766 12*s.* 6*d.*, making together the sum of £8464 12*s.* 9*d.*, whereof (*a*) the sum of £2957 8*s.* 3*d.* has been withdrawn from the Death Duty Grant; and (*b*) the sum £5507 4*s.* 6*d.* from the Agricultural Grant. These deductions have been made in alleged pursuance of certain statutory provisions of the Land Purchase (Ireland) Acts enabling deductions to be made from said grants for the purpose of recouping certain losses incurred in the working of the finance of said Land Purchase Acts. The grounds and reasons alleged for the making of said deductions are hereinafter fully set forth. Your suppliants submit that said deductions are illegal and not authorized or warranted by the Land Purchase (Ireland) Acts or any statutory of legal authority; and your suppliants have in this petition hereinafter set forth how far and in what manner they contend said deductions are illegal, and their reasons for so contending.

3. According to a statement made in the House of Commons on 23rd April, 1907, by the Financial Secretary to the Treasury, the deductions from the said grants made to the Irish County Councils (amounting as stated by him to £70,996) were made on

the ground that under sect. 29 (2) of the Irish Land Act, 1903, the Guarantee Fund is liable to make good any deficiency in the income account of the Irish Land Purchase Fund, and that so far as these deficiencies are caused by the issue of Guaranteed Land Stock at a discount, the Irish Development Grant, as one of the constituent parts of the Guarantee Fund, was first to be charged, under section 38 of the said Act of 1903, so long as it is able to meet them, but that there were other deficiencies on the income account with which the Local Taxation Grants, as constituents of the Guarantee Fund, were directly chargeable, and that these deficiencies arose from the following causes:—

(1) Arrears from the payment of Purchase Annuities,	£9,119
(2) Unearned Dividends on issue of Stock, ..	23,750
(3) Advance Dividends, ...	13,650
(4) Interest due but not received, ...	15,500
(5) Unproductive Balances, ...	8,977
	£70,996

4. The first item of the said deductions from said grants to which your suppliants take exception is the said item, "Unearned Dividends on issue of Stock, £23,750." This is explained by the Treasury as follows:—Under sect. 28 (1) of the Irish Land Act, 1903, for the purpose of raising the money required for the Irish Land Purchase Fund, the Treasury may, by warrant addressed to the Bank of England or Bank of Ireland, direct the creation of a new capital stock (to be called "Guaranteed two and three-quarters per cent. Stock"), consisting of perpetual annuities yielding dividends at the rate of 2¾ per cent. per annum on the nominal amount of the capital; and it is further provided (sect. 28 (2)) that the said annuities shall be payable by equal half-yearly or quarterly dividends at such times in each year as may be fixed by the warrant first creating the stock. The stock issued in pursuance of these provisions is issued as entitled to a full half-year's dividend on the first following dividend day, although the subscribers to the stock are allowed to pay up their subscriptions by instalments which may extend up to or even beyond the

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dividend day. It is contended on the part of the Treasury that the loss thus incurred is under and by virtue of section 29 of the Irish Land Act, 1903, to be made good out of the Guarantee Fund, which, under section 5 (1) of the Irish Land Act, 1891, and section 40 of the Irish Land Act, 1903, comprises, *inter alia*, the said Irish Death Duty Grant and the Agricultural Grant.

5. Your suppliants submit that said contention is not well founded, and that the said deduction is erroneous and illegal. Your suppliants submit (1) that no claim for dividends on stock is chargeable against the Irish Land Purchase Fund except in respect of sums raised by stock and carried to the credit of the capital account of the said fund; and they submit that no statutory or other powers exist enabling such advance dividends to be charged against the said fund or paid out of the income account of the said fund. They further submit (2) that no dividends on the said stock were during the financial years aforesaid paid out of the Consolidated Fund of the United Kingdom as a temporary advance to the Irish Land Purchase Fund under section 29 of the Act of 1903, and that the Guarantee Fund is accordingly not liable to make good any such payments. Your suppliants further say that the loss incurred as "unearned dividend on issue of stock" is an expensive issue within the meaning of section 28 (4) of the Irish Land Act, 1903, and should under that section be provided for before any sums raised by means of the stock are carried to the capital account of the Irish Land Purchase Fund. (4) In the alternative your suppliants further submit that the said loss or deficiency is a deficiency arising by reason of the issue of stock at a discount within the meaning of section 36 (6) of the Irish Land Act, 1903, and that the said deficiency within such section is to be made good out of the Guarantee Fund, that section 38 of the Irish Land Act, 1903 (which allocates portion of the Irish Development Grant to the Guarantee Fund), provides that so far as any portion of the Irish Development Grant credited to the Guarantee Fund is required for the purpose of making good any deficiency in respect of the issue at a discount of stock, such portion shall be applied for that purpose before the Death Duty Grant and (by section 40 of the said Act) before the Agricultural Grant, and that

accordingly they submit that the said loss or deficiency should have been made good out of the Irish Development Grant available for the purpose of land purchase, which was more than sufficient to meet said loss or deficiency, and the same was wrongly deducted from the said Death Duty Grant and Agricultural Grant. Your suppliants further say (5) that the "unearned dividends" are not dividends at the rate of $2\frac{3}{4}$ per cent. on the capital stock within the meaning of sections 28 and 29 of the Irish Land Act of 1903, and are not payable out of the income of the Irish Land Purchase Fund.

6. The next item of deduction to which your suppliants take exception is the said item called "Advance Dividends, £13,659." The said deficiency is stated by the Treasury to be caused by reason of the fact that the annuities payable by the tenant-purchasers are paid one month earlier that the stock dividend day, so that the annuity from the purchaser on his first gale day includes interest for one month less than the period for which the dividend on the stock is payable. The deficiency is alleged to arise by reason of the income of the Land Purchase Fund being unable to meet the demands upon it, and recourse has accordingly been had under said section 38 of the Act of 1903 to the Death Duty Grant and the Agricultural Grant.

7. By way of objection and answer to said deduction, your suppliants say (1) that if the said sum of £23,750 wrongfully (as your suppliants contend) paid out of the income of the Land Purchase Fund as "unearned dividends" on stock, as mentioned in paragraph 3 hereof, were restored, the deficiency mentioned in paragraph 5 hereof would not have arisen or existed. Further, your suppliants say (2) that the sum of £50,000, payable out of the Irish Development Fund Grant for the financial year ending the 31st day of March, 1907, has not been carried to the income account of the said Land Purchase Fund as hereinafter mentioned, and they submit that the said £50,000 should be restored or be deemed to be restored to the said income account, and they say that the said £50,000 was, and is, applicable and should be applied towards payment of this deficit (if any), which it would more than satisfy, and the other alleged deficiencies in the income account of the Land Purchase Fund.

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8. The next item of deduction to which your suppliants take exception is the said item called "Unproductive Balances, £8,977." The said balances are alleged to have been caused by moneys lying in the Bank of England uninvested by the National Debt Commissioners up to the 31st March, 1906. Your suppliants say that the said sum of £8977 is not legally chargeable against the Guarantee Fund, and they further say if the said sum of £23,750 wrongfully (as your suppliants contend) paid out of the income of the Land Purchase Funds as unearned dividends on stock as hereinbefore mentioned, or if the said sum of £50,000, hereinbefore and hereinafter mentioned, were restored to the income account of the Irish Land Purchase Fund, the alleged deficiency mentioned of £8977 would not have arisen or existed.

9. Your suppliants also charge and submit that the Irish Development Grant created by the Ireland Development Grant Act, 1903 (3 Edw. 7, c. 23), has not been duly applied under the provisions of the 38th section of the Irish Land Act, 1903, but has been diverted to other purposes, with the result that the said Death Duty and Agricultural Grants have been improperly charged with sums which should have been paid primarily out of the Development Grant portion of the Guarantee Fund.

10. Your suppliants further say that up to December, 1906, £2,162,733 Guaranteed Stock purported to have been issued under the Act of 1903, which is termed in the Irish Land Purchase Fund Account "Excess Stock," being stock purporting to have been issued to make good the loss occasioned by the Guaranteed Land Stock being issued at a discount, together with a sinking fund at the rate of ten shillings per cent. thereon; and your suppliants say that the dividends on such stock and the said sinking fund, if chargeable at all against the Land Purchase Fund or Guarantee Fund, have been and should now be made good out of that portion of the Guarantee Fund of which the said Development Grant (after providing for the statutory payments therein mentioned) formed part before the Death Duty Grant and Agricultural Grant portion of the Guarantee Fund could be resorted to; but the Development Grant portion of the Guarantee Fund was not so applied, and the Development Grant was itself applied to purposes which were and are puisne to the liability to make

good the deficiency in respect of the issue of the said Land Stock at a discount, and a very large deficiency was thereby wrongly caused in the income account of the Land Purchase Fund, with the result of wrongly charging the Death Duty and Agricultural Grants portion of the Guarantee Fund.

11. Your suppliants further submit that the sum of £50,000, as hereinbefore mentioned, payable out of the Irish Development Grant to the income account of the Irish Land Purchase Fund for the financial year ending 31st March, 1907, has been improperly withdrawn therefrom, and they say that up to the 31st day of March, 1905, a sum of £150,000 has been paid from the Irish Development Grant into the income account of the Irish Land Purchase Fund under the provisions of sect. 38 of the Irish Land Act, 1903. They further say that the Secretary to the Treasury stated in the House of Commons on the 23rd April, 1907, that as from the 31st March, 1906, the unexpended balances of money payable from the Irish Development Grant should, under the provisions of sect. 15 of the Labourers (Ireland) Act, 1906, be used as a working balance, and should not be reckoned as part of the income of the Land Purchase Fund in determining whether that income was sufficient under sect. 29 (2) of the Irish Land Act, 1903. He further stated that the working balance so obtained amounted to the sum of £98,000. Your suppliants say that the said sum of £98,000 includes the sum of £50,000 payable from the Development Grant for the financial year ending 31st March, 1907; and they submit that the said sum was not upon the true construction of the said sect. 15 of the Labourers (Ireland) Act so applicable, and they say that out of the said sum of £98,000 only such portion thereof (if any) as represented moneys transferred from the Irish Development Grant prior to the 31st March, 1906, and which remained then unexpended, was applicable for the purposes of such working balance, as aforesaid, and that they submit that all moneys payable or paid from the Irish Development Grant, under section 38 of the Irish Land Act, 1903, after the 31st day of March, 1906, should have been paid to, and reckoned as forming part of, the income account of the Irish Land Purchase Fund, and they say that if such payment had been so made and reckoned, the alleged deficiencies so

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charged, as aforesaid, against the Irish Land Purchase Fund would not exist, nor would the said Death Duty and Agricultural Grants have been liable to be resorted to as part of the Guarantee Fund.

12. Your suppliants further contend and submit that the withdrawal from your suppliants of the sum of £2,957 8*s.* 3*d.*, from the Death Duty Grant, and of £5,507 4*s.* 6*d.* from the Agricultural Grant are irregular and invalid, for the following further reasons:—The said deductions purport to be made under certificates respectively issued by the Irish Land Commission, and by the Lords Commissioners of His Majesty's Treasury under Statutory Rules 10 and 23, dated the 24th November, 1904, and purporting to be made under section 6, sub-sections 4 and 5, of the Irish Land Act, 1891, and the Treasury Rule No 10, dated 14th April, 1905, made under the 41st section of the Irish Land Act, 1903; and your suppliants submit that the said Statutory Rules 10 and 23 of 24th November, 1904, are *ultra vires* and void so far as they purport to enable any charge to be made against, or apportioned between, the counties in Ireland for any deficiencies in the Land Purchase Fund arising otherwise than from non-payment of purchase annuities. And your suppliants also submit that the said Rule No. 10, and any other Treasury Rule of the 14th April, 1905, is void and *ultra vires* so far as it or they purport to apportion or charge any such liabilities upon the said counties, or any of them, or direct that the amount of liability assigned to each county under the said Rules shall be ascertained on the basis of the amount of the advances outstanding in each county.

13. Your suppliants further contend that any deficiencies in the income of the Land Purchase Fund under the Act of 1903, arising otherwise than from non-payment of Purchasers' Annuities, should be made good out of the Guarantee Fund as a whole, according to the priorities in which the constituent parts of said Guarantee Fund are applicable for the purpose of making good the said deficiency, and that under section 40 of the Irish Land Act, 1903, the whole of the Irish Death Duty Grant is applicable and must be exhausted before the Agricultural Grant is resorted to, and they say that the whole of the Death Duty Grant for the financial years ending 31st March, 1906, and 31st March, 1907,

had not been exhausted, and accordingly the deduction made from the Agricultural Grant payable to them is void.

14. Your suppliants further say that the accounts of the Irish Land Purchase Fund for the financial year ending 31st March, 1906, had been closed, and that no deficiency in respect of which any charge arose against your suppliants or other Irish County Councils appeared therein, and your suppliants submit that there is no power after the closing of the accounts for the said year to now re-open them and charge the said County Councils with any of such alleged deficiencies, and among others the said sum of £1698 0*s.* 3*d.* in the second paragraph of this Petition mentioned, against your suppliants.

15. The subject-matter of this Petition arose within that part of the United Kingdom of Great Britain and Ireland called Ireland.

Your suppliants therefore pray :—

1. That it may be declared that the said deductions of £1,698 0*s.* 3*d.* and £6,766 12*s.* 6*d.* respectively, making together the sum of £8,464 12*s.* 9*d.*, from the amounts of the grants payable to your suppliants for the financial years ending respectively 31st March, 1906, and 31st March, 1907, were not lawful.

2. That it may be declared that the respective sums of £2,957 8*s.* 3*d.* Death Duty Grant, and £5,507 4*s.* 6*d.* Agricultural Grant, are payable to your suppliants, and that your suppliants may have judgment for the same sums.

3. That it may be declared that the application of the Irish Development Grant, as mentioned in paragraph 9 hereof, is illegal and void, and that it may be directed that the said grant shall be applied in making good the deficiencies arising in respect of the issue of stock at a discount before being applied to the purposes puisne thereto mentioned in the estimates for 1906–1907.

4. Such relief in the premises as the nature of the case may require.

5. Costs.

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The answer and plea of the Crown was as follows:—

1. The Attorney-General refers to the several statutes and provisions relating to the distribution to and amongst the several counties in Ireland of the Agricultural Grant and of the Death Duty Grant.

2. In reply to the matters stated in the petition, it is true that in the financial years 1906 and 1907 advances were made amounting in all to the sum of £73,218 12*s.* 5*d.* from the Guarantee Fund in order to make good a deficiency to that extent during those years in the income account of the Irish Land Purchase Fund. The said sum was required for the purpose of making payment of dividends upon Guaranteed Land Stock created pursuant to sect. 28 of the Irish Land Act, 1903. The whole of the said sum was applied in the payment of such dividends and not otherwise; and the Attorney-General says that the said advance was properly made from the Guarantee Fund for the purpose of meeting the deficiency so existing in the income account of the Land Purchase Fund.

3. As to paragraphs 4 and 5 of the petition, the sum of £23,750 mentioned therein became payable and was paid as dividend upon stock issued under sect. 28 (1) of the Irish Land Act, 1903, under the Treasury Warrant in that behalf. The said sum was not expenses of issue within the meaning of sect. 28, sub-sect. 4, of the said Act, nor did the said sum represent loss arising from the issue of stock at a discount within the meaning of any of the provisions referred to, and the Attorney-General says that the said sums were legally and properly payable out of the income of the Irish Land Purchase Fund. The said sum of £23,750 was advanced from the Guarantee Fund to the Irish Land Purchase Fund out of cash standing to the credit of the Guarantee Fund, pursuant to rule 5 (2) of the rules and regulations made by the Treasury, dated 14th April, 1905, and under the Purchase of Land (Ireland) Act, 1891 (Guarantee Fund Apportionment) Regulations, 1904. The Attorney-General says that the said advance as made was legally and properly effected in pursuance of the said rules and regulations and the provisions of the statutes relating thereto.

4. As to paragraphs 6 and 7 of the petition, the Attorney-General repeats his contention in relation to the sum of £23,750 therein referred to. As to the sum of £50,000 payable out of the Irish Development Grant for the financial year ending the 31st March, 1907, the Attorney-General says the said sum was carried to income account of the said Land Purchase Fund, but that the said sum was, pursuant to the 15th section of the Labourers (Ireland) Act, 1906, held as a working balance, and was not and is not to be reckoned as part of the income of the Irish Land Purchase Fund in determining whether the income was insufficient under sect. 29 of the Irish Land Act, 1903.

5. In reply to paragraph 8 of the petition, the Attorney-General repeats the contention in the last paragraph hereof.

6. The Irish Development Grant has been duly applied under the provisions of sect. 38 of the Irish Land Act, 1903, and has not been diverted to any other purposes, and no sums have been charged upon the Death Duty and Agricultural Grants which should have been primarily paid out of the Development Grant portion of the Guarantee Fund.

7. As to the 10th paragraph of the petition, all payments, whether for dividends or sinking fund, in respect of "Excess Stock" have in fact been discharged out of the Development Grant. The Development Grant has not been applied to any purposes puisne to the liability of making good losses in respect of the issue of Land Stock at a discount, and no deficiency was caused in the income of the Irish Land Purchase Fund, and no charge was imposed upon the Death Duty and Agricultural Grants, as alleged in the said paragraph of the petition.

8. As to paragraph 11, the Attorney-General repeats what he has hereinbefore stated respecting the said sum of £50,000, and the provisions relating thereto contained in sect. 15 of the Labourers (Ireland) Act, 1906.

9. As to paragraph 12, the Attorney-General refers to the certificates issued by the Irish Land Commission and the Lords Commissioners of His Majesty's Treasury mentioned in paragraph 12 of the petition, and the Attorney-General denies that the Statutory Rules and the Treasury Rule therein mentioned are *ultra vires* and void as alleged.

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10. As to paragraph 13, the Attorney-General does not admit the contention therein, and he says that under the Irish Land Purchase Acts and the aforesaid Purchase of Land (Ireland) Act, 1891, (Guarantee Fund Apportionment) Regulations, 1904, as between the several counties in Ireland, an advance from the Guarantee Fund to the Irish Land Purchase Fund is chargeable as a matter of adjustment between the counties upon the share of each county in the respective constituent parts of the cash portion of the Guarantee Fund in the order of their respective priorities. The suppliants' share in the Death Duty Grant being insufficient to meet the charge falling on the suppliants in respect of the advance made as aforesaid from the Guarantee Fund to the Irish Land Purchase Fund, the share of the suppliants in the Agricultural Grant mentioned became chargeable for the balance to the extent mentioned as a matter of adjustment as aforesaid.

11. The Attorney-General disputes the contention in paragraph 14, and says that the deductions and charges therein mentioned were legally and properly made.

12. The share of a county in the funds constituting the Guarantee Fund is and must be ascertained in manner prescribed by Rule 8 of the Purchase of Land (Ireland) Act, 1891, (Guarantee Fund Apportionment) Regulations, 1904, and the share of the suppliants in the Death Duty Grant and Agricultural Grant was for the year specified—*i.e.* in the year 1907—duly ascertained and the sums found to be the share of the suppliants in the said funds were duly paid to the suppliants. The Attorney-General will submit that it is not open to the suppliants to claim a larger sum than the amount so found to be the amount due to the suppliants out of the said funds.

13. In so far as the question raised relates to the share of the suppliants in the Guarantee Fund and to the rights and burdens of the suppliants in respect of payments thereout, the Attorney-General says that under the Purchase of Land (Ireland) Act, 1891, section 6, sub-sect. 6, the said question should be determined by the Lord Lieutenant and not otherwise.

14. The Attorney-General says and will submit that the said Petition is not good and sufficient in law, and that a Petition of Right does not lie in respect of any of the matters set forth in the

Petition, and that none of the relief claimed by the suppliants can be obtained by them in this proceeding.

The suppliants delivered the following reply:—

1. The suppliants join issue upon the answer and plea herein.

2. By way of further reply to paragraph 3 of the said answer and plea, so far as the said sum of £23,750 was advanced from the Guarantee Fund to the Land Purchase Fund out of cash standing to the credit of the Guarantee Fund, pursuant to any rules or regulations under the Purchase of Land (Ireland) Act, 1891, (Guarantee Fund Apportionment) Regulations, 1904, the suppliants say that the said rules and regulations were *ultra vires* and void, and the said advance was illegal.

3. By way of further reply to paragraph 4 of the answer and plea, the suppliants, as to the said sum of £13,650, "advance dividends," say that the deduction of said sum of £13,650 is illegal, and that the same cannot be charged against the Guarantee Fund, or any part thereof.

4. By way of further reply to paragraphs 10 and 12 of the answer and plea, the suppliants say that the regulations referred to in said paragraph 10 are *ultra vires* and void.

The case was set down by order of the Court for argument on the points of law arising upon paragraphs 13 and 14 of the answer and plea.

The Attorney-General, the Solicitor-General, and *Dudley White,* for the Crown.

Serjeant O'Connor, K.C., A. W. Samuels, K.C., and *James O'Connor,* for the suppliants.

The arguments, including the exceptions taken by the Crown to the right of the suppliants to raise the matter in question by Petition of Right, are fully set out in the judgment of the Lord Chief Baron.

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The following cases were referred to:—*Kelly* v. *The Queen* (1); *Windsor & Annapolis Railway Co.* v. *The Queen* (2); *Rustomjee* v. *The Queen* (3); *Feather* v. *The Queen* (4); *The King* v. *The Lords Commissioners of the Treasury* (5); *Reg.* v. *The Lords Commissioners of the Treasury* (6); *Owens* v. *The Queen* (7); *In re Nathan* (8); *Bush* v. *King* (9); *Cooper* v. *The Queen* (10); *The Bankers' Case* (11); *Thomas* v. *The Queen* (12); *Tobin* v. *The Queen* (13); Chitty on Prerogatives.

May 18.

PALLES, C.B.:—

By section 48, sub-sect. 1, of the Local Government (Ireland) Act, 1898, it is enacted that there shall be annually paid out of the Consolidated Fund to the Local Taxation (Ireland) Account a sum to be called "the Agricultural Grant," equal to half the amount certified under the Act as having been raised in the whole of Ireland, by poor rate and county cess, off agricultural land during a period therein described as "the standard financial year."

By sub-section 2 of the same section it is enacted that "such portion of the Agricultural Grant as is certified under this Act to be payable to each Council shall be issued by the Lord Lieutenant from the Local Taxation (Ireland) Account to that Council half-yearly, subject nevertheless to such conditions and provisions as are contained in this Act." No such conditions or provisions in the Act have been referred to as material for our consideration.

Section 49 of the Act makes provision for the Local Government Board certifying the amount raised in the whole of Ireland, by poor rate and county cess, off agricultural land during the "standard financial year," and also the proportion of the Agricultural Grant payable to each County Council, including the suppliants, the County Council of Kildare; and each of those

(1) [1898] 2 I. R. 719; [1899] 2 I. R. 360.
(2) 11 A. C. 607.
(3) 1 Q. B. D. 487; 2 Q. B. D. 69.
(4) 6 B. & S. 257.
(5) 4 A. & E. 298.
(6) L. R. 7 Q. B. 387.
(7) [1900] 2 I. R. 513.
(8) 12 Q. B. D. 461.
(9) 3 I. L. T. 390.
(10) 14 Ch. D. 311.
(11) 14 State Trials, 83.
(12) L. R. 10 Q. B. 31.
(13) 16 C. B. (N. S.) 310.

amounts has been duly certified by the Local Government Board. The first of them amounts to £1,455,310, so that the Agricultural Grant, which is one-half of this sum, is £727,650 per annum. The suppliants' share of this annual sum, as certified, is £15,740. The Irish Land Act, 1903, by its 40th section, directs this Agricultural Grant to be paid to the Guarantee Fund established by the Purchase of Land (Ireland) Act, 1891. The latter Act charges this Fund with the amount of any deficiency of an account called the "Land Purchase Account" to meet certain dividends and sinking-fund payments; and the Irish Land Act of 1903 imposes certain other charges on it; but section 5 of the Act of 1891 directs that the money paid to the Guarantee Fund shall, "so far as not required to meet charges on the fund already accrued, be forthwith paid to the Local Taxation (Ireland) Account."

It is not expressly alleged in the petition that Parliament provided sufficient moneys for payment of this grant for the financial years 1906 and 1907; but this fact is, I think, to be implied from the case it makes, that deductions from that grant were made by servants of the Crown—deductions which could not have been made unless Parliament had granted the Crown the moneys from which the deductions were made. But even were there not this implication, if the moneys were not provided by Parliament—which is not pretended—this fact would be matter for plea, as a similar omission was treated in *Churchward* v. *The Queen* (1). The presumption is that the sums were so provided.

The petition then alleges that there has been deducted from the "Agricultural Grant" for the years 1906 and 1907 the sum of £7541 0*s.* 1*d.*; by which I understand that the sum paid or allocated by the Commissioners of the Treasury to the "Local Taxation (Ireland) Account" in respect of this grant for those years was less than the grant provided by Parliament by this sum of £7541 0*s.* 1*d.* This sum, unless duly paid away in pursuance of the Acts of 1891 and 1903, or of some other Act of Parliament, by the Commissioners of the Treasury, must be deemed to remain in their hands as servants of the Crown. The Crown cannot discharge itself of any part of the amount by

(1) L. R. 1 Q. B. 173.

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alleging that its servants have disbursed it, without showing that such disbursement was authorized by law.

The suppliants further allege that, of the £7541 0*s.* 1*d.* so deducted from the entire grant, £5507 4*s.* 6*d.* was deducted from their share of the grant; so that of the two annual sums payable to them in respect of it, the sum of £5507 4*s.* 6*d.* still remains due to them; and one of the objects of this petition of right is to obtain payment of this sum from the Crown, in whose hands it is alleged it must be deemed to remain.

The second sum with which the petition is conversant, and of which it seeks to obtain payment, is £2957 8*s.* 3*d.*, a portion of the Irish Death Duty Grant, to which it is alleged that the suppliants are entitled, and which they allege remains unpaid to them.

The title of the suppliants to this portion of these duties arises under the "Probate Duties (Scotland and Ireland) Act, 1888," by section 1 of which it is enacted that the Commissioners of Inland Revenue shall from time to time, in such manner and under such regulations as the Treasury may from time to time make, pay in every financial year to the Local Taxation (Ireland) Account such sum as may be ascertained to be nine hundredth parts of the Probate Duty Grant.

By section 3 of the same Act it is enacted that all sums paid in respect of the Probate Duty Grant to the Local Taxation (Ireland) Account shall be annually distributed by the Lord Lieutenant (after payment of a sum of £5000 as to which no question arises) in halves, viz., one half among the Guardians of the Unions, and the remaining half amongst the road authorities in Ireland, in fixed and permanent proportions to be ascertained and certified by the Local Government Board for Ireland.

The suppliants became, under the Local Government Act, and now are, entitled to the sums payable under that Act to the Guardians of the Unions and to the road authorities within the county of Kildare, and the proportion of the annual grant to which they are so entitled has been duly ascertained and certified by the Local Government Board; so that the portion of those sums which, under section 3 of the Act, ought to have been paid by the Lord Lieutenant to the suppliants, had a portion

of it not been intercepted by subsequent legislation, is fixed and certain.

By the Act of 1891, to which I have already referred, these duties were brought into the Guarantee Fund; but the balance of them (after satisfying the charges thereon created by that Act and by that of 1903, also already mentioned) is, under the Act of 1891, to be paid to the Local Taxation (Ireland) Account.

From the sums payable by the Commissioners of Inland Revenue, under section 1 of this Act, in respect of the financial years 1906 and 1907, £65,677 12*s.* 4*d.* has been deducted by the Commissioners of the Treasury, and the balance only has been paid by them to the Local Taxation (Ireland) Account. The amount of the suppliants' share of this grant, which is included in this sum of £65,677 12*s.* 4*d.*, is, as they allege, £2957 8*s.* 3*d.* This is the second sum of which by this petition the suppliants seek to obtain payment.

The petition alleges that the Crown claims that these sums of £65,677 12*s.* 4*d.*, and £7541 0*s.* 1*d.*, which have been deducted from these grants, have been rightfully deducted in pursuance of other statutes; and it proceeds to allege matters which the suppliants insist show that they were not rightfully deducted within the meaning of those statutes. If they have been rightfully deducted, then, undoubtedly, this petition cannot be maintained; but the counsel for the Crown go further, and insist that they are not bound to show in this Court that the moneys have been so rightfully deducted. They propound a doctrine which, at the present day, in the third century after the revolution, seems to be a strange one—that the executive officers of the Crown, purporting to act in the execution of the duties imposed upon them by such statutes as those I have referred to, are not liable to be called upon by any Court of Judicature to show that they have legally applied moneys which were granted by Parliament for a specific purpose, and which have come under their control. They insist that the only tribunal competent to determine whether or not the will of Parliament as to these moneys has been carried out is Parliament itself. This contention seems to me—I say it with all due deference—a strange confusion between legislative and judicial functions;

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but, as it has been pressed upon us with all the weight which the authority of the law officers most justly carries, it must be carefully considered and deliberately decided, even though we may be of opinion that the petition admits of another and easier answer. Whether a Court, without in the first instance considering whether it has jurisdiction to determine a controverted matter, should proceed to express an opinion which, in event, may be extra-judicial, has been more than once considered. That course was adopted by the House of Lords in *Steers* v. *Rogers* (1), and by our Court of Appeal in *The Queen* v. *Inspectors of Fisheries* (2), a decision to which I myself was a party, and in which, although personally I was of opinion that the appeal lay, a decision that it did lie would possibly not have been obtained, and certainly would not have been a unanimous one. I, however, entirely agree with the judgment of Gibson, J., in *Owens* v. *The Queen* (3), that such a course ought to be an exceptional one; and in a case such as the present, when the counsel for the King deny the right of the Court to inquire how his servants have disposed of money which came to his hands for a specific purpose, and call upon us to refuse to do so, very respect for the Crown demands that the existence of our jurisdiction should be the first matter for determination.

In proceeding, then, to consider the question of jurisdiction, I, of course, do not refer in detail to the provisions of the Acts of 1891 and 1903, under which the disposition actually made of the moneys by the Crown is said to be authorized, because the question is, whether we have jurisdiction to determine whether such disposition is lawful, or indeed, to inquire what has been the disposition of them. I have referred to them merely to show that the suppliants have an interest in the subject-matter of the petition.

This brings me to one of the subsidiary grounds upon which the Crown denies our jurisdiction to hear this petition. It is said that the interest of the suppliants in the Local Taxation (Ireland) Account is not sufficient to sustain a Petition of Right; that, as in ancient times the only judgment given against the Crown on a Petition of Right in relation to land was one of *amoveas manus*,

(1) [1893] A. C. 232. (2) [1896] 2 I. R. 57. (3) [1900] 2 I. R. 531.

so now, on a petition in respect of a money demand, the only possible judgment is one directing or declaring the suppliants' right to payment. I desire not to express my opinion as to how this might have been before our Judicature Act, as the matter involved is the disposition of the revenues of the Crown; and I am not prepared to admit that the old equity jurisdiction of the Exchequer as a Court of Revenue, would not have extended to such an inquiry as the present. But however this might have been before the Judicature Act, I can have no doubt that, since that Act, a Petition of Right is maintainable by a person having only such an interest in the subject-matter as to entitle him to a declaration of right—as, *ex. gr.*, to a declaration that the sums—if we should find that there are any—that have been wrongly intercepted, should be now lodged to the Local Taxation (Ireland) Account.

I proceed now to the more general question. Now, in the first place, I remove out of the discussion all question of contract. I agree with the Attorney-General that the suppliants' right is founded, not upon contract, but upon grant. Later on I shall refer to the question, whether a Petition of Right will lie upon a grant of the Crown, just in the same manner as it will on a contract by or for the Crown; but in the first instance I desire to consider whether the moneys in question ought to be deemed to be the property of the suppliants in the hands of the servants of the Crown; because, if they ought to be, the jurisdiction to hear the petition cannot be denied.

These moneys were, undoubtedly, granted by Parliament, and were by it directed to be paid into the Local Taxation (Ireland) Account. The share of the suppliants in them, subject to the charges created by the Acts of 1891 and 1903, has been ascertained in moneys numbered, through machinery appointed by Parliament; so that the right of the suppliants, subject to those charges, is to ascertained sums. The present case (subject to the question of charges, which in this connexion I do not deem material) does not differ from the simple one of a specific sum having been granted by Parliament to a named individual—say, to a distinguished General—and of that sum having been, in pursuance of the directions of Parliament, paid to a servant of the

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Crown, to satisfy the Parliamentary Grant, and alleged to have been misapplied by him. Were the person to whom the money was paid not a servant of the Crown, he would have received it to the use of the grantee. In the case of its receipt by a servant of the Crown, it is different, as the Crown cannot hold money for the use of a subject; but the money in the hands of a servant of the Crown, and in respect of which his only legal duty is one to the Crown, can still be the money of a subject, just as the lands of a subject may be in the hands of the Crown, through its servants. The question, then, is: Is it, although in the hands of the Crown, the money of the suppliants, in the sense in which that expression is used in this connexion? In my opinion it is. The grants made by the Acts of 1888 and 1898 operated, as in my opinion do all statutable grants, as grants by the Crown. The Lords and Commons, by making themselves parties to the grant, guaranteed that they would provide sufficient funds to enable the Sovereign to make good the grant; but, in law, it was the grant of the Sovereign, as truly as it would have been had it been made, not by Act of Parliament, but by Patent under the Great Seal, as was the grant of Charles 2, which was the subject of *The Bankers' Case* (1). It is true the Agricultural Grant is a grant out of the Consolidated Fund; and the Act of 1888, granting the Probate Duties, strangely enough, seems to intercept these duties in the hands of the Commissioners of Inland Revenue before they reach the Lords Commissioners of the Treasury, who are usually regarded as the custodians of the Consolidated Fund; but still, in the hands of the Commissioners of Inland Revenue, they are part of the Consolidated Fund; and the Consolidated Fund is, constitutionally, the property of the Sovereign, although payments out of it are appropriated by Parliament.

The Sovereign, then, has granted these sums. He has, with the co-operation of Parliament, provided money to satisfy those grants. He has authorized the transfer of the money granted (subject to charges thereon) to a special account, "Local Taxation (Ireland) Account," for the purpose, as to a part equal to the suppliants' share of them, of paying it to the suppliants. I am of

(1) 14 State Trials, 1.

opinion that the share therein of the suppliants becomes their money, subject to the charges thereon. It is not money received to their use, because the Sovereign by reason of his dignity is not capable of receiving or holding money in that manner, but still money which, in the hands of the Crown, has rightly become the money of the suppliants. It cannot be suggested that anyone but the Crown, or the grantee, is the owner of it; so, if it be not the money of the Crown, it must be that of the grantee. It cannot be used by the Crown, or applied by it in any other way than by handing it to the grantee; and, according to the judgment of some distinguished Judges, there is a moral duty in the Crown to apply it in that mode. Thus the Crown has none of the incidents of ownership, other than the mere possession, and, as against the suppliants, cannot claim to be its owner.

The case for the Crown is rested upon a passage in the judgment of Coleridge, J., in *The King* v. *The Lords Commissioners of the Treasury* (1); and on the decision in *Reg.* v. *Lords Commissioners of the Treasury* (2). In the passage cited in the first of these cases, Coleridge, J., gives as his reason for granting a mandamus that he did not think a Petition of Right would lie, because it supposed the King to be in full possession of the chattel or hereditament claimed, and that there he was not in possession of the sum applied for, and had no control over it, as it was appropriated by Act of Parliament, and in the possession of a public board. This case has long since been overruled, or, at least, it has been held not to apply to modern Appropriation Acts; and this statement of Coleridge, J., if applied to such Acts as grant the moneys in question here, is contrary to the subsequent case relied on, *i.e.*, that in Law Reports, 7th Queen's Bench.

The *decision* in the second case was no more than that a mandamus would not lie, because the money was in the hands of the Commissioners of the Treasury as servants or agents of the Crown, who in relation to the money in question there were held to be accountable theoretically to the Crown, but practically to the House of Commons, "and in no sense accountable to this

(1) 4 A. & E. 298. (2) L. R. 7 Q. B. 387.

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or any other Court of Justice." "There is not," says Lush, J., "a word, to my mind, in this Act, *or any other Act*, showing an intention on the part of the Legislature to impose any such obligation *on the officers* of the Crown, so as to subject *them* to the jurisdiction of this Court in reference to the disbursement of moneys voted by the Crown for specific purposes." This passage, in terms, refers to the proceedings which were under consideration there—proceedings which were not against the Crown, but against its officers and servants. As to them, the law is no doubt correctly stated; but that law in nowise bears upon the present proceeding, which is one, not against an officer or servant, but a constitutional proceeding in substance against the Crown itself, in the form of an inquiry undertaken by the Court at the command of the King, "Let right be done." In the case I have last referred to, the only right conferred by Parliament upon the applicant county to the money thereby sought to be recovered, was by the Appropriation Act. Here the sums are claimed under Acts granting to the suppliants a specific share of these moneys, so that their right did not depend upon the Appropriation Acts. "It seems to me," says Lord Blackburn (page 399), "that the obligation, such as it is, is upon Her Majesty, to be discharged through her servants; and you cannot proceed, therefore, against the servants." To the same effect is Cockburn, C.J. (page 394): "I take it, with reference to that jurisdiction"—*i.e.*, the jurisdiction to issue a mandamus—"we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim, even in appearance, to have any power to command the Crown. The thing is out of the question. Over the Sovereign we can have no power. In like manner, where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

That case was in reference to what in Treasury language is called "a supply service": the present case is conversant with a Consolidated Fund service. There is no analogy between the rights in relation to grants for these two species of services. In the case of a "supply service," the *only* grant is to the Sovereign. As put by Sir George Jessel, Solicitor-General, *arguendo*—"The

effect of the annual Appropriation Act is, not to give any third person a right to the money, but it is to prevent the Crown from appropriating money given for one purpose to another. The money is not a charge on the Consolidated Fund, although it comes out of that fund. It is voted annually. . . . It is not an enabling, but a restrictive, Act. . . . These sums are given to the Crown, and there is no legal obligation on the Crown which this Court can enforce."

I assume all this to be true, as to a sum to which the title of the subject is under an Appropriation Act, although I am aware that in making this assumption I am acting against the opinion of Lord Blackburn; but I distinguish that case from the present in this: that here the grant was not to the Crown, as it is in an Appropriation Act, but to the counties direct, and that it was a charge upon the Consolidated Fund.

Rustomjee v. *The Queen* (1) was referred to by the Crown; but it is clearly distinguishable. There the suppliant sought to rely upon some words contained in a treaty made between Her Majesty and the Emperor of China, as entitling him to receive a certain portion of a fund received under that treaty. The ground of the decision was that Her Majesty acted, throughout the making of the treaty, in her Sovereign character, and on her own inherent authority; and as in making the treaty, so also in performing it, she was beyond the control of municipal law.

In re Nathan (2), which was relied on for the Crown, is, in truth, an authority the other way. The application there was for a mandamus to the Commissioners of Inland Revenue to return overpaid duty on the grant of an administration. It was refused upon the ground, *inter alia*, that if the applicant was entitled to have it paid back to him, Petition of Right was the proper remedy. Bowen, L.J., says:—"In substance the money has been paid, not to the Commissioners, but to the Crown. I, therefore, very much doubt whether, under any circumstances, a mandamus could be the right remedy in this case. I will not, however, pronounce upon that point. But, at all events, a mandamus ought not to be granted if there is any other remedy. To my mind there is a clear remedy in a Petition of Right, if the applicant is entitled to

(1) 1 Q. B. D. 487; 2 Q. B. D. 69. (2) 12 Q. B. D. 461.

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any remedy at all. The money is in the hands of the Crown, and there is an old constitutional way by which subjects of the Crown in this country are enabled to obtain back, out of the hands of the Crown, either land, or money, or goods, upon which the Crown has laid its hands; and that is by the proceeding known as Petition of Right."

None of these cases appears to me to present any difficulty; and, in result, the counsel for the Crown have failed to satisfy me that the sums sought to be paid are not, if they have not been rightfully paid away, money of the suppliants in the hands of the Crown, through its agents.

The next argument for the Crown assumes that the money is not the suppliants' money in the hands of the Crown; and proceeds to show that if it is not, it is not the subject of a Petition of Right; in other words, it is insisted that a Petition of Right will not lie to obtain payment of money granted to an individual by Parliament, when Parliament has placed funds in the hands of the Sovereign or his servants for the purpose of paying the sum granted. This is a singularly bold proposition. It seeks to separate grants made by the Crown into two classes: those made by the Crown, without the consent of Parliament, for consideration; and those made without consideration, although made with the consent of Parliament. The former, it is admitted, arising out of contracts, can unquestionably be made the subject of a Petition of Right. The latter do not, it is said, answer the description of contracts, and in relation to the rights arising out of them, a Petition of Right will not lie. A grant made by the three estates of the realm, in the manner which is the most unquestionable according to our law, is, it is suggested, to be held to be inferior in relation to remedy to the grant of one of those estates.

I entirely repudiate any such inferiority. I admit that much of what we know about Petitions of Right is in relation to matters arising out of contracts. It is not difficult to account for this. There is no statute prescribing the subject-matters cognizable under a Petition of Right, which must, therefore, be determined by the common law. Now, in ancient times, during the existence of the great feudal estates—indeed, so long as questions as to feudal tenure almost monopolized, if they did not dominate, our law, such proceedings

were mainly conversant with rights in relation to land. As to these, the law is tolerably well settled; but this is in spite of (to use the words of Lord Blackburn in *Thomas* v. *The Queen* (1)) many of the authorities to which recourse might be had being so antiquated as to be connected with forms of procedure with which no one now alive is familiar, and being capable of being misapprehended. It is, however, a matter of history that Lord Somers took the utmost pains to fully investigate the law in relation to this form of proceeding, as far as it was material to the decision of the well-known *Bankers' Case* (2). That case arose upon a grant of King Charles II., which was, no doubt, consequent upon a contract; and, when referred to in subsequent cases of contract, is treated as one of contract; and, consequently, the matters insisted upon, and the authorities cited there, are mainly those in relation to contract; and anterior to this judgment, we have practically no reliable authority, save those cited therein. But, in truth, that case was one of grant. No distinction was drawn in the judgment there between a grant by the King for consideration and a grant by the King without consideration. Such a thing is not hinted at throughout the case. Lord Somers says (at col. 80):—"Let us see, then, what this suit is for, and what was the course taken at common law to recover a thing of this nature. The suit is for the arrears of an annuity granted to Sir Robert Vyner, and his heirs, by the King's predecessors, out of a branch of the hereditary revenues of the Crown. . . . Now, as far as I can find, by the common law, in all cases where arrears of annuity, or annual rent, or sum, were demanded by the subject from the Crown (whether it was originally granted by the Crown out of any part of the revenue, or was issuing out of lands which afterwards came to the Crown), the only remedy which the subject had for recovery thereof was by petition to the King. The authorities are very express and full in this matter." Many of these authorities are cited in columns 81 and 82 of the 14th volume of the State Trials, all of which are cases of grant. "Suppose a man hath a rentcharge, or a rent service, or other rent, issuing out of land by prescription, or grant, and this land comes to the King by grant or forfeiture; in all such

(1) L. R. 10 Q. B. at p. 34. (2) 14 State Trials, 1.

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cases the owner of the rent is put to his petition to the King, and hath no other remedy whatsoever. . . . And since that statute, in the case of *Wicks* v. *Dennis* (1), it was holden by the whole Court, that during the Queen's possession of the land, the rentcharge issuing out of it is only recoverable by petition, although the demand of the rent was agreed to be good, because in his petition the party must show that he did demand the rent. And as the law is plainly so, where a person has a title to a rent, by grant of a subject, out of lands which come to the possession of the King; so the case is to all intents and purposes the same, where he has a title to a rent or yearly sum by letters patent from the Crown. . . . By all these authorities, and by many others which I could cite, both ancient and modern, it is plain that if the subject was to recover a rent, or annuity, or other charge, from the Crown, whether it was a rent or annuity originally granted by the King, or issuing out of the lands which by subsequent title came to be in the King's hands; in all cases the remedy to come at it was by petition to the person of the King; and no other method can be shown to have been practised at common law. Indeed, I take it to be generally true, that in all cases, where the subject is in the nature of a plaintiff, to recover anything from the King, his only remedy at common law is to sue by petition to the person of the King."

These passages seem to me to show that there was no such distinction as has been suggested here; because the grant of an annuity does not necessarily involve a contract, but may be by will, or by deed poll; and where the lands come to the Crown charged with the annuity, the relation between the annuitant and the Crown is not one of contract. The privity, in such a case, is one of estate, not of contract. The very idea of suggesting that the remedy for non-performance of an Act of Parliament depends on the antecedent matter, whether that Act of Parliament was passed in pursuance of a previous contract, involves an absurdity for which there is no warrant in our law. Again, some of the most usual subjects of Petitions of Right are pensions; and they are not necessarily (indeed they seldom are) matter of contract;

(1) 31 & 32 Eliz.; 1 Leon. 190.

and in one of the cases mentioned by Mr. Clode (but not reported), that of Mr. Bushe, it would be impossible to suggest any relation arising out of contract between the suppliant and anyone representing the Crown, in relation to the part of the pension, the subject of that Petition of Right. The right of the suppliant there, in respect of which the claim arose, was conferred solely by Act of Parliament. Contract there was none; and yet the Petition of Right was successfully maintained. So, too, I might mention that Lord Bowen, in his judgment on the Petition of Right arising out of the Kerkee booty, relies, as the reason for his judgment, upon the fact that the suppliant there had not had a grant of part of the booty from the Crown, plainly meaning that, if he had such a grant, the petition would have lain. Indeed, were it not for a lamentable inaccuracy in one of the judgments relied upon by the Crown, in omitting to repeat, in a general negative proposition, an exception which had been referred to a few lines previously—a proposition which has since been several times repeated in judgments of authorities, and actually commended as "accurate" by the Privy Council, I should not have thought it necessary to refer to this alleged distinction.

The error upon which, if I may respectfully say so, the argument of the counsel for the Crown proceeds, is that they treat the judgments in the four cases they have cited as excluding money, claimed under grants from the Crown, from the subject-matter of Petitions of Right. But, upon a critical examination of those cases, that will be found to be erroneous. The first of them to which I refer is that of *Tobin* v. *The Queen* (1), in which a most learned judgment was delivered by Erle, C.J. The question there is usually stated to be whether a Petition of Right would lie for an act of wrong committed by a servant of the Crown; but the real decision was not that the procedure by Petition of Right would have been erroneous, had the suppliant a right against the Crown in respect of the wrongful act there complained of. The ground of the decision was the elementary principle that the King can do no wrong, and, therefore, the wrongful act was that not of the Sovereign, but of the

(1) 16 C. B. (N. S.) 310.

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servant. Erle, C.J., says (page 353):—"The maxim that the King can do no wrong is true, in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the Sovereign does personally the law presumes will not be wrong. That which the Sovereign does by command to his servants cannot be a wrong in the Sovereign, because if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command. . . . This maxim has been constantly recognized, and the notion of making the King responsible in damages for a supposed wrong tends to consequences that are clearly inconsistent with the duty of the Sovereign." Later on, he says (page 355):—"We come now to the authorities showing where the Petition of Right will lie, and where it will not lie. We pass the class of claims founded on contracts and *grants* made on behalf of the Crown with brief notice, because *they* are within a class legally distinct from wrongs."

And after stating that in *The Bankers' Case* (1), Lord Somers so treats *them*, that is, claims founded as well on grants as on contracts, giving various instances of petitions for money on account of wages, and work, and debts, and goods, founded on contract, and that he makes no allusion to a claim against the King for damages for a wrong, he proceeds:—"We pass from the class of claims on contract—in all systems of law distinguished from claims founded on wrong"; thus distinguishing, from the case before him, a claim under a grant, in the same way as he did a claim under a contract. The real distinction throughout the entire of this elaborate judgment, given in the year 1864, is that between claims arising out of rightful acts, by which the servant of the Crown was capable of binding the Sovereign, and claims arising out of wrongful acts by Crown servants—acts which cannot, under any circumstances, be attributed to him.

Feather v. *The Queen* (2) was decided in the following year. The principal question discussed, and indeed the only one actually decided there, was whether the grant of a Patent, in

(1) 14 State Trials, at p. 83. (2) 6 B. & S. 257.

its ordinary form, precluded the Crown from the use of the invention. The act there complained of—the infringement of the Patent by the servants of the Crown—was purely an act of wrong; and the question was discussed whether such an act might be deemed to be the act of the Sovereign, so as to be the subject of a Petition of Right. The passage in the judgment upon which the Crown relies is (page 294):—"We concur with the Court of Common Pleas in thinking that the only cases in which the Petition of Right is open to the subject are where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money; or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service."

With much deference, I must state that this gloss upon the decision of the Common Pleas is inaccurate. It omits the words "or grant," in the expression "or where the claim arises out of a contract." The judgment proceeds:—"It is in such cases only that instances of Petitions of Right having been entertained are to be found in our books." (This is not accurate, if claims on foot of grants are excluded.) "No case," he adds, "has been adduced, after all the industry and learning that have been brought to bear upon the subject, both in this case and in that of *Tobin* v. *The Queen* (1), in which a Petition of Right has been brought in respect of *a wrong, properly so called.*"

In these latter words, he states the real effect of the cases he refers to, and corrects his previous erroneous reference to them. Either the Court, in using the negative words I have referred to (words always dangerous), intended, as I believe it did, to treat grants and contracts as in the same category of rightful acts, or they do not accurately represent the decision of the Common Pleas. At all events, their intention was no more than to approve of that decision. The grounds of their decision apply only to an act of wrong, and to that, not because of anything faulty in the procedure, but because the act is not that of the Sovereign.

(1) 16 C. B. (N. S.) 310.

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"A Petition of Right"—the judgment proceeds (p. 295)—"in respect of a wrong, in the legal sense of the term, shows no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong, it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes in law the act of him who directed or authorized it to be done. It follows that a Petition of Right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground."

In *Thomas* v. *The Queen* (1), the application of the remedy of Petition of Right was practically extended. It was there held that it would lie for a breach of contract, which consisted of an act, not of omission, but of commission, resulting not in a debt, but in unliquidated damages, although, in a sense, the breach was an act of wrong. It was so held, upon the authority of Lord Somers' opinion in *The Bankers' Case* (2), although there was an absence of ancient precedent, "All the entries in the ordinary Courts, with the exception of that case, and one upon which it proceeded," as stated by Blackburn, J., in delivering the judgment of the Court, "being of petitions in the nature of a real action to recover freehold land, or a freehold rent issuing out of land; and, in all, the judgment was that of '*amoveas manus*.'" That case certainly cannot be relied upon by the Crown in support of the proposition that the present petition will not lie.

Lastly, in *Windsor and Annapolis Railway Co.* v. *The Queen* (3), a decision of the Privy Council, *Thomas* v. *The Queen* (1) was followed. This decision is relied upon by the suppliants and

(1) L. R. 10 Q. B. 31–35. (2) 14 State Trials, 83. (3) 11 App. Cas. 607.

by the Crown: by the Crown, because Lord Watson, in delivering the opinion of the Privy Council, expresses their Lordships' approval of what he calls "the accurate exposition of the law given in *Feather* v. *The Queen*" (1), contained in the words which I have already quoted; and by the suppliants, for the general doctrine laid down in that opinion. This approval does not, to my mind, extend the subject-matter of that decision, which is co-extensive with that of *Tobin* v. *The Queen* (2), and excludes from the purview of a Petition of Right (to use the words of Cockburn, C.J.) only "an act of wrong properly so called." The opinion is valuable, in reference to the argument for the Crown here, because it takes for its basis the passage in the judgment of Erle, C.J., in *Tobin* v. *The Queen* (2), which distinguishes claims founded on grants, as well as those on contracts, from those resting on wrongs. The words are: "In *Tobin* v. *The Queen* (2), Chief Justice Erle, whilst affirming the doctrine that the Sovereign cannot be sued in a Petition of Right for a wrong done by the Executive, took care to explain that 'claims founded on contracts *and grants* made on behalf of the Crown are within a class legally distinct from wrongs.'"

That petition was founded upon a contract; and Lord Watson, naturally, points out that Lord Blackburn, in *Thomas* v. *The Queen* (3), had stated that, from the time of Lord Somers, there had been repeated expressions of opinion by eminent Judges in favour of the view that a Petition of Right lay against the Crown on a contract. He adds: "Their Lordships may refer to the accurate exposition of the law given by the late Cockburn, C.J., in *Feather* v. *The Queen* (1): 'We think it right to state that we see no reason for dissenting from the conclusion arrived at by the Common Pleas in *Tobin* v. *The Queen* (2). We concur with that Court in thinking that the only cases in which the Petition of Right is open to the subject are, where the land, or goods, or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or when a claim arises out of a contract, as for goods supplied to the

(1) 6 B. & S. 257. (2) 16 C. B. (N.S.) 310. (3) L. R. 10 Q. B. 31.

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Crown, or to the public service.'" Thus again repeating what I cannot regard otherwise than an accidental omission of the word "grant," as one of the subject-matters in respect of which a claim is sustainable upon a Petition of Right.

Upon a review of all the cases cited by the counsel for the Crown under this head of their argument, I am satisfied that the maxim that the King can do no wrong is at the root of the limitation of the subject-matter of a Petition of Right laid down in those cases; that the distinction is between claims arising, on the one hand, out of rightful acts, by which the Crown can be bound; and, on the other, claims arising out of wrongful acts, by which the Crown cannot be bound; and that, at common law, there is a remedy for every act done by the servants of the Sovereign, which, were he a common person, would render him liable to an action. If that act be one of wrong, it cannot be imputed to the Sovereign, although it were by his express command; and the remedy is against the servant only. In every other case, I am prepared to hold that the remedy is by Petition of Right. I think this is the logical result of Lord Somers' argument.

The next argument relied on for the Crown, to show that the due application of the deducted sums was not examinable by us, has for its basis sub-section 6 of section 6 of the Purchase of Land (Ireland) Act, 1891, to which I have already referred. That section enacts that all questions which arise as to the share of any county, local authority, or person in any fund or sum dealt with in that Act, or as to the rights or burdens of any county, or local authority, or person in respect of payments out of the Guarantee Fund or the Local Taxation (Ireland) Account, shall be determined by the Lord Lieutenant; and his decision shall be final.

The Guarantee Fund there referred to is that to which I have already referred, as having been established by section 5 of the Act of 1891. It was to consist of two portions, the cash portion and the contingent portion. The cash portion was to include, *inter alia*, the Irish Probate Duty Grant; and by its 6th section it is provided that if an account called the "Land Purchase Account" was at any time insufficient to meet the dividends and

sinking fund payments, the deficiency should be a charge on the Guarantee Fund, and, subject to such subsequent adjustment of charge between the several counties as thereinafter mentioned, should be paid thereout to the Land Purchase Account, or, so far as the deficiency had been paid out of the Consolidated Fund, to that Fund.

The adjustment here referred to is provided by section 6, subsection 4, of the Act, which enacted that "a charge on the Guarantee Fund shall, as between the counties, be adjusted and be borne by such county and in such manner, and the burden as between the local authorities and persons in the county shall, subject to the provisions of this Act, be adjusted and borne in such manner as may be provided by regulations of the Lord Lieutenant made with the consent of the Treasury"; and, by subsection 5, "The share of a county in the Guarantee Fund or any portion thereof for any purpose of this Act shall be ascertained by the Lord Lieutenant in accordance with the regulations under this section"; and it is directed that those regulations shall provide for apportioning the Guarantee Fund in the proportion in which the Irish Probate Duty Grant, and certain other duties, were distributable amongst the local authorities and persons in each county, on the basis of the financial year in which the apportionment was made.

By the Ireland Development Act, 1903, a grant of £185,000 a year was provided, which was to be called "The Irish Development Grant"; and by the Irish Land Act, 1903, section 38, £50,000 of this grant in each financial year, up to and including the year ending on 31st March, 1907, is directed to be carried to the income account of the Irish Land Purchase Fund; and the residue of the grant during that period, and subsequently the whole grant, was to form part of the Guarantee Fund. So far as any portion of the amount so credited to the Guarantee Fund was required for the purpose of making good any deficiency in respect of the issue at a discount of stock issued under the Act, that portion was to be applied next before the Death Duty Grant; and any portion of the remainder required for the purposes of the Guarantee Fund was to be applied next after the Agricultural Grant; and by sect. 40, that Agricultural Grant was directed

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to be paid to the cash portion of the Guarantee Fund, and was to be applicable to the purposes of that cash portion next after the Death Duty Grant.

The result of these complicated provisions appears to be that the liability, as between the various parties interested in the Guarantee Fund, to the charges thereon, is that the Irish Development Grant is primarily liable to make good losses incurred by the issue of stock at a discount; and, next, the Death Duty Grant. We need not further consider the order of liability to this class of losses. As regards other charges upon the Guarantee Fund, the grants included therein appear to be liable thereto in the following order—(1) Death Duty Grant, (2) Agricultural Grant, (3) Irish Development Grant.

Now, the case made by the Petition of Right is twofold—first, that larger amounts have been deducted by the Lords Commissioners of the Treasury from the Agricultural Grant and Death Duty Grant, than were charged upon or in any wise payable out of the Guarantee Fund; and, secondly, that the various funds constituting the cash portion of the Guarantee Fund have been applied to satisfy liabilities created by the Act of 1903, in a wrong order of priority; as, *exempli gratiâ*, that the Irish Development Grant was not resorted to to make good losses arising from the issue of stock at a discount; and, consequently, that the Death Duty Grant has been unduly burthened, to the prejudice of the suppliants. The Crown contends, and the suppliants deny, that because of sub-sect. 5 of sect. 6 of the Act of 1891, these matters are not cognizable by us, and that the Lord Lieutenant is the sole tribunal to determine them.

I am of opinion that this contention of the suppliants is right.

I agree with the counsel for the Crown that the jurisdiction of the Lord Lieutenant by sub-sects. 4 and 5 of sect. 6 of the Act of 1891 extends to the Guarantee Fund, as enlarged by the Act of 1903, and to the liabilities under the latter Act. As to this, I need not add anything to what I have fully stated in *Talbot Crosbie's Estate* (1). Indeed, the present question is much

(1) [1905] 1 I. R. 575.

clearer than was that decided there; because here, the Guarantee Fund is dealt with as the one continuing fund, although by the Act of 1903 additional subject-matters are brought within it, and it is subjected to additional liabilities. Taking, however, the jurisdiction of the Lord Lieutenant as embracing the subject-matters of the Act of 1903 as well as that of 1891, I think it quite clear that it did not extend to determining anything as between the Treasury and the Counties; as, for instance, the amount to be deducted in respect of any particular charge. "County, local authority, or person," in sub-sect. 6, do not include the Treasury. The rights or burdens of these counties, &c., in respect of a payment, do not include the amount of a payment, but are restricted to the mode in which the payments made are to be distributed. Further, this sub-section must be read in reference to sub-sects. 4 and 5, which are in express words limited to adjustments between counties, local authorities, and persons *in the county*.

Further, I am of opinion that it is essential to the validity of any regulations made by His Excellency with the consent of the Treasury, that they should be in accordance with the express provisions of the Acts; as, *ex. gr.*, those in respect of priority of liabilities. And, as these regulations are to control all action under sub-sect. 4 and sub-sect. 5, the subject-matters of which appear to me to be co-extensive with that of sub-sect. 6, it seems to me that it is not within the jurisdiction of His Excellency to determine questions of priority of liability, such as is, at least, one of the subject-matters of the Petition.

I am of opinion, therefore, that this second contention of the Crown fails; and that, consequently, we are obliged to consider whether the validity of the deductions made from the grants has been successfully impeached by the petition.

By far the most important question, both as to amount and principle, which arises in reference to these deductions, is the suppliants' contention that the entire capital loss incident to the issue of the stock at a discount—a sum stated to exceed two millions sterling—should have been paid out of the Irish Development Grant, so far as it would extend, instead of stock having been created to meet this loss, the Development Grant being

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charged only with the dividends on this stock, and the residue of that grant, after satisfying the dividends, being applied to other purposes. The solution of this question depends on the meaning of "deficiency," in the expression "any deficiency in respect of the issue at a discount of any stock," in section 38 of the Act of 1903.

To arrive at the meaning of this expression, "deficiency in respect of the issue at a discount of any stock," we must see what action the Act directs to be adopted in that event. This is the subject-matter of section 36, sub-sect. 6:—"Where by reason of any stock having been issued at a discount, the sums payable in any financial year by the Land Commission under this section, in respect of advances to them of money raised by means of stock, are insufficient to pay the dividends on the total amount of the stock outstanding, together with ten shillings per cent. on the portion of the stock representing the advances on which such ten shillings per cent. is payable by the Land Commission, the amount of the deficiency shall be made good out of the Guarantee Fund."

Reading these sections together, the matter seems clear. The earlier part of section 36 directs payment by the Land Commission to the National Debt Commissioners of interest at $2\frac{3}{4}$ per cent., and $\frac{1}{2}$ per cent. towards a sinking fund, on all sums advanced. If the stock be issued at a discount, the sum payable by the purchasers to the Land Commission, which is to be interest and a sum towards the sinking fund, calculated at the same rates, but on the amount of cash, as distinguished from the amount of stock, cannot be equal to the interest and sinking fund payable at the same rates, calculated on the stock which was issued at a discount to pay it. The latter amount must be the greater. The National Debt Commissioners, being obliged to pay at $3\frac{1}{4}$ per cent. on the amount of stock they have issued, will not be wholly repaid by a payment at $3\frac{1}{4}$ per cent. on the smaller amount of cash realized by the sale of that stock. There is a deficiency in the income; and this, in my clear opinion, is the deficiency mentioned in section 38.

Upon this question, therefore, in my opinion, our decision must be for the Crown.

The next objections I shall refer to are those stated in paragraph 3 of the petition. Of these, No. 1 has not been argued. No. 2 refers to a sum of money incident to issuing stock with a provision that dividends upon it shall be calculated from a fixed day previous to its issue. This is no more than a common incident to the flotation of stock; and is within the ample powers in respect of it given to the Treasury by the Act. No. 3 is the result of a deficiency caused by the annuities payable by the tenant purchasers not being paid in fact until after the dividends on the stock have become payable, and are paid. This caused a deficiency of income, to provide against which this sum had to be expended. It is impeached as not a proper charge on the Guarantee Fund, upon two grounds. First, because if the Irish Development Grant had been applied in the manner insisted by the petition, there would not have been such a deficiency. This is answered by our decision, that the mode in which the Irish Development Grant has been dealt with is the correct one.

The second objection is, that the deficiency would not have arisen, had not a sum of £50,000 been misapplied, as it is alleged to have been. This question depends upon the construction of section 15 of the Labourers (Ireland) Act, 1906, which is in the following terms:—"Any sums carried, under section 38 of the Irish Land Act, 1903, out of the Ireland Development Grant to the income account of the Irish Land Purchase Fund, and not expended on the 31st day of March, 1906, shall be used as a working balance, and shall not be reckoned as part of the income of the Irish Land Purchase Fund in determining whether that income is insufficient under section 29 of the said Act."

The contention for the suppliants is that the words, "any sums carried, under section 38 of the Irish Land Act, 1903, . . . to the income account of the Irish Land Purchase Fund, and not expended on the 31st March, 1906," do not include the sum directed by that section to be carried to that account in respect of the financial year 1907. This is, perhaps, the only matter in the case as to which, at any time, I entertained some doubt. The section referred to directs that £50,000 shall, in each financial

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year, up to and including the year ending on the 31st March, 1907, be carried to the specified income account.

The words of sect. 15 are "*any* sums carried." If, then, this £50,000 was carried to the specified income account before the passing of the Labourers Act on the 4th August, 1906, this sum of £50,000 would be within them; and the subsequent words, "not expended on the 31st March, 1906," would not, in my opinion, be sufficient to so cut down those words as to exclude this sum. Are we, then, to enter upon an inquiry as to the exact date when, as a matter of book-keeping, this £50,000 was carried to this account? I think not. The sum was directed to be so carried in the financial year which was current when the Labourers Act was passed. It had been dedicated by the Act of 1903 to the specified income account of that then current year, which was the last year in which it was provided that such a sum should be so carried. Parliament, I think, regarded it as an annuity which had ceased. Its last gale had accrued due. The subject-matter within the section was arrears remaining in hand; and, probably, the reason why expenditure after 31st March, 1906, was not deducted was because it was known that none such had been incurred, in consequence of the date at which the Bill was introduced, or, possibly, in anticipation of its introduction. Upon this item, also, I am in favour of the Crown.

Neither can the last objection referred to in paragraph 5—that as to £8977 for unproductive balances—be maintained. Were there default by servants of the Crown in allowing balances to remain unproductive, the Sovereign would not be liable therefor. The default could not be imputed to him. It would not be his act. I think this objection was hardly insisted upon at the Bar.

The objection to the validity of the rules of the Lords Justices and the Treasury is directed to rule 23 of the former, and rule 10 of the latter, because they purport to enable a charge to be apportioned between the counties for deficiencies in the Land Purchase Fund arising otherwise than from non-payment of the purchase annuities; and is rested upon the ground (which, I have already stated, I hold to be untenable) that sub-section 6 of section 6 of the Act of 1891 did not apply to the new grants brought into

the Guarantee Fund by the Act of 1903, or to the new liabilities thereby created. This objection relates particularly to deficiencies under section 36, sub-section 6, of the Act of 1903, resulting from the issue of stock at a discount, which it is said are not in any wise chargeable upon any portion of the Guarantee Fund, other than the Development Grant. I confess to not understanding this argument. Section 36, sub-section 6, of the Act of 1903 expressly enacts that the amount of these deficiencies shall be made good out of the Guarantee Fund. I have already expressed my opinion as to the priority in which the various grants constituting this Fund are applicable. In my opinion, the deficiencies are charged on the *entire* of the Guarantee Fund; and, so far as that priority is not declared by statute, it can, in my opinion, be determined by the Lord Lieutenant, with the consent of the Treasury, under section 6 of the Act of 1891. The rules of the Lords Justices alleged to be *ultra vires*, although not signed by the Lords of the Treasury, purport on their face to be made with their consent, and it is not alleged that they were not so made. The subsequent Treasury Rules are consequential upon those of the Lord Lieutenant; and rule 10 is authorized by section 41 of the Act of 1903, provided the rules of the Lord Justices are (as I hold them to be) *intra vires*.

I have now dealt with all the objections which have been argued. I am of opinion that none of them can be sustained; and consequently that our judgment should be for the Crown.

As to costs: the Crown must have the general costs of the petition; save the costs of the argument, the length and expense of which must have been doubled, by the Crown insisting upon matters as to which our decision has been against it. As to this each party should abide his own costs.

Andrews and Johnson, JJ., concurred in the judgment of the Lord Chief Baron.

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KENNY, J. :—

The points of law that have been so exhaustively argued before us in this case have been raised by the 13th and 14th paragraphs of the answer and plea of the Attorney-General. In the latter paragraph it is submitted that the proceeding by Petition of Right does not lie in respect of any of the matters set forth in the petition; and, in the 13th paragraph, the question is raised as to the power of the Lord Lieutenant to conclude the suppliants in respect of their claims against the Guarantee Fund, by his determination pursuant to sect. 6, sub-sect. 6, of the Land Purchase Act, 1891. We are therefore asked to consider, in the first place, the grave constitutional question as to the right of the subject to proceed by Petition of Right in such cases as the present; and in case we should hold that the proceeding is maintainable, it will become necessary to determine whether any of the various claims on which the Petition of Right is based are good and sufficient in law. If we were of opinion that they could not be supported, it would be unnecessary to give a decision on the main question as to whether a Petition of Right was open to the suppliants at all; but the matter has been so fully and so well discussed that I think I should express an opinion on it.

Subject to the qualification referred to by my Lord Chief Baron as to the omission of claims arising under grants from the King, in the necessity of which qualification I entirely concur, the guiding rule for the circumstances in which Petition of Right will lie is to be found in the judgment of Cockburn, C.J., in *Feather* v. *The Queen* (1), afterwards approved of and adopted by the Judicial Committee of the Privy Council in *The Windsor and Annapolis Railway Co.* v. *The Queen* (2), where the judgment of the Committee was delivered by Lord Watson. According to that judgment the only cases in which the Petition of Right is open to the subject are "when the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money,—or where a claim arises out of a contract, as for goods supplied to the Crown or to

(1) 6 B. & S. 493. (2) 11 A. C. 607.

the public service." In the present case we are dealing with moneys in which the suppliants claim to be interested, and which are alleged to be in the hands of the Crown. They make out their case in this way. The County of Kildare and the suppliants as its County Council are entitled to annually receive for local purposes certain shares in two funds known as the Death Duty Grant and the Agricultural Grant. The former is payable directly by the persons who collect it, namely, the Commissioners of Inland Revenue. The latter is a grant out of the Consolidated Fund. Both form portion of a miscellaneous collection of funds, called the Guarantee Fund, dedicated by Act of Parliament towards making good certain possible losses in the working of the finance of the Land Purchase Acts. Losses have been incurred, and, in order to recoup such losses, recourse has been had to this Guarantee Fund, whereby the County of Kildare has been deprived of portions of the two funds which I have mentioned. These portions, they say, have been wrongfully withheld by the Treasury, and must be regarded as still in their hands. The wrongful withholding is alleged to have been caused by irregular administration in connexion with the finance of the Land Purchase Acts, which resulted in a deficiency in the Land Purchase Fund, and a consequent resort to the Guarantee Fund. Now, assuming for the purpose of the present demurrer that there was such irregularity as is alleged, and that the Treasury ought to have produced a much larger sum, available for the Land Purchase Fund, than they actually did, can the suppliants, who claim to have thereby suffered a loss, obtain redress by Petition of Right? I agree with my Lord Chief Baron in thinking that they can. The County Council say that these two funds—the Death Duty Grant and the Agricultural Grant—have been unduly applied by way of guarantee to the extent of, in the whole, £8464 12*s.* 9*d.*; that that sum should have been forthcoming by the Treasury and paid by the latter to the Local Taxation Account,—and, not having been so, that it must be deemed to be still in the hands of the Crown. The sums constituting the £8464 12*s.* 9*d.* must, in my opinion, be regarded, for the purposes of the demurrer on this point, as ear-marked sums, which, *inter alia*, were appropriated by Parliament to the purposes of the County of Kildare, and which,

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having found their way into the possession of the Crown in the first instance, are, contrary to such statutory appropriation, still in the possession of the Crown. The Guarantee Fund, to which its constituent parts have to be paid in the first instance, is under Treasury control (1). The Treasury have also under their control the flotation of the capital stock created by the 28th section of the Irish Land Act, 1903, in respect of which the irregularities are stated to have arisen. If these alleged irregularities had not occurred, it is contended that there would be no necessity to resort to the Guarantee Fund. If moneys that ought to have been available are not so by reason of an erroneous conception of their duties and rights by the Treasury, who are the King's servants, I consider that such moneys must be regarded as never having left the control of the Crown, and as being still in its hands. I do not think that any distinction can be drawn between moneys that are the subject-matter of direct charges on the Consolidated Fund and those that are voted by Parliament out of the Consolidated Fund, and are the subject of an Appropriation Act. In both cases they must be taken to be the proceeds of public taxes granted to His Majesty and collected by his servants, and in both cases they have formed part of the Consolidated Fund of the realm. I, therefore, am of opinion that our judgment on this point should be in favour of the suppliants.

I pass now to the consideration of the various claims on which the suppliants rest their case. They arise under six heads, and are as follows:—(1) The issue of an excessive amount of land stock; (2) advance dividends; (3) unearned dividends; (4) unproductive balances; (5) withdrawal of £50,000 from income account of the Irish Land Purchase Account; and (6) the application of the Death Duty Grant.

The case as to "excess stock" is based on the issue at a discount of the Guaranteed 2¾ per cent. Stock, authorized by section 28 (1) of the Irish Land Act of 1903. It is contended that the additional stock that had to be issued to make up the loss on flotation at a discount and a sinking fund should have been paid off out of another fund that also formed part of the Guarantee

(1) Section 5 of Land Purchase Act. 1891.

Fund, namely, the Development Grant. I confess I felt some difficulty in following the contention of the suppliants on this point. Serjeant O'Connor admitted that his clients would not be much hurt by the irregularity (if any); but he wished to point out that there was an irregularity. The answer given by the Solicitor-General to this claim was that no injury was done; that the stock was irredeemable for thirty years, under section 28 (3); and that the dividends on it were paid out of the Development Grant. It seems to me that this claim has no legal basis, and that it is an illustration of the truth of the Solicitor-General's observation, that if this Petition of Right were successful, the only result would be the settlement of a schedule of priorities and the transfer of liability to some other Irish funds.

"Advance dividends" and "unearned dividends" may be dealt with together. What took place in the carrying out of the financial operations connected with the issue of stock under the Act of 1903 was as follows:—The 27th section of the Act provided that advances on sales of holdings were to be made by means of money and not by means of Guaranteed Land Stock, and such money was to be issued out of a fund to be under the control of the National Debt Commissioners, and to be called the Irish Land Purchase Fund. By section 28 the money required was to be provided by the creation of new $2\frac{3}{4}$ per cent. stock. By subsection 5 of the same section the stock was to be issued at such times, in such amounts, and subject to such conditions as to payment of deposits and instalments, and the issue of scrip certificates carrying dividends, and otherwise as the Treasury should direct. The stock could not be issued at par—in fact, a considerable part of it fetched only $84\frac{3}{4}$ when it was put up to tender. Flotation at a discount was clearly contemplated (see section 36 (6)). The issue being at a discount, of course a larger amount had to be issued than if the stock had been floated at par. In order to attract the public and to enhance the value of the stock, investors were given the privilege of paying by instalments, and they were also offered full half-years' dividends, although their instalments were not fully paid up before the dividend day. Furthermore, the dividend day being the 1st July, the tenant-purchasers' annuities, which were the first fund for payment of the dividends,

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were due on the 1st June. It is claimed that a loss was suffered in respect of this last arrangement by what is called an "advance dividend," and that the greater part of the half-yearly dividend payable in respect of a period less than the half-year is to be regarded as unearned. In my opinion, the 5th sub-section of section 28, which I have already referred to, is a complete answer to this claim, and the latter is not maintainable in law.

In the fourth head of claim it is said that the National Debt Commissioners had balances in their hands which they ought to have invested, and in which the suppliants had an interest. The reply to this claim is that this is a charge of wilful default against the Crown officers, and not a claim for moneys in their hands, and cannot be supported. I cannot see that any duty to invest such balances was imposed on the National Debt Commissioners as between them and the suppliants.

The fifth claim deals with a sum of £50,000, payable to the income account of the Irish Land Purchase Account (1), and withdrawn in pursuance of sect. 15 of the Labourers Act, 1906. By the Ireland Development Grant Act, 1903, an annual sum of £185,000 was provided for certain purposes therein set forth; and by section 38 of the Irish Land Act, 1903, a yearly sum of £50,000, up to the year ending 31st March, 1907, was taken from this grant, and directed to be carried to the income account of the Irish Land Purchase Fund. Those Acts were followed, in 1906, by the Labourers (Ireland) Act of that year, which, in its 15th section, enacted that any sums carried under the aforesaid 38th section of the Act of 1903 out of the Development Grant to the income account of the Land Purchase Fund, *and not expended on the* 31*st March*, 1906, should be used as a working balance, and should not be reckoned as part of the income of the Land Purchase Fund. The section does not state the purposes to which this working balance is to be applied, but there can be no doubt that the amount is not to be included in the income of the Land Purchase Fund. The £50,000 for the year ending March, 1907, has been paid to the Land Purchase Fund, but withdrawn from it, in accordance with the construction given to the section by the Treasury. The question is, whether the enactment extends to the

(1) Section 38, Act of 1907.

year 1907, or is confined in its operation to the year ending the 31st March, 1906. I confess to having had considerable difficulty in dealing with this section. If the suppliants be correct in their view, that it does not capture the £50,000 payable for the year ending March, 1907, the income account of the Land Purchase Fund should benefit to that extent in relief of the Guarantee Fund. The section is anything but clear. I think, however, that the Crown argument is right. The sums are sums "carried" and "not expended on the 31st March, 1906." I think it clear that this date is referable only to the non-expenditure, and that it does not govern the earlier part of the section. Does "carried" mean "already carried," or "that have been or may be carried." If it means the former, I would hold that the suppliants are right. But I do not think it does. It seems to me to refer to both a past and future "carrying." If so, then the subsequent words are not inconsistent, for they are capable of referring not alone to the past but to the subsequent year.

The remaining claim raises a question as between the County Kildare and the other Irish counties. It is submitted that not only must the share of the Death Duty Grant allotted to Kildare by the Lord Lieutenant be exhausted before resorting to the Agricultural Grant, but also every portion of the whole of Ireland's share in the Death Duty Grant, though already apportioned to other counties. The soundness of this contention depends on the validity of rules made by the Lord Lieutenant and by the Treasury, pursuant to the Land Purchase Acts and the Act of 1903, which have been challenged on the ground of *ultra vires*. It is sufficient for me to say that I am clearly of opinion that the rules are not *ultra vires*, and that the whole of the Death Duty Grant is not to be so applied. I need only refer to sections 41 and 100 of the Act of 1903, which seem to me to confer ample powers to make those rules.

On the whole case I am of opinion that the suppliants have failed, and that the demurrer should be allowed.

Solicitor for the suppliants: *W. Grove White.*
Solicitor for the Treasury: *N. G. Towers.*

J. L.

Appeal.
1908.

Dec. 2.
1909.
Jan. 13, 25.

THE ATTORNEY-GENERAL *v.* ROSS (1).

Revenue—Stamp—Receipt—Stamped receipt for two sums—Contemporaneous unstamped receipt for one of such sums—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 101, 103.

The defendant gave N. a duly stamped receipt for a sum paid by N. for rent and goods supplied, and at the same time gave N. (as the defendant alleged, for book-keeping purposes only) a separate document, purporting to be a receipt for the rent alone, which exceeded £2:—

Held, by the Court of Appeal (reversing the decision of the King's Bench Division), that the latter document required a stamp.

THIS was an appeal from an order of the King's Bench Division (reported [1908] 2 I. R. 403), refusing a motion to set aside the judgment entered at the trial for the defendant, and to enter judgment for the informant. The information was one on the Revenue side by the Attorney-General to recover penalties from the defendant for having given to one Thomas P. Nolan certain receipts liable to duty and not duly stamped. The information was tried by Gibson, J., without a jury. It appeared at the trial that Joseph Ross, the defendant's father, let certain premises at Dundrum, Co. Dublin, to Thomas P. Nolan at £38 per annum, payable by £3 3*s.* 4*d.* per month in advance. Ross used to supply Nolan with milk, butter, &c., the amount due for these being paid by Nolan monthly, at the same time as the rent. An account for goods and rent was sent to Nolan monthly, and he paid the amount by cheque. It was alleged by the defendant—but this was denied by Nolan—that on payment this account was duly stamped and receipted. At the same time, and, as the defendant alleged, for book-keeping purposes, a separate receipt for the rent was passed to Nolan, such document not being stamped. The composite receipt contained no particulars of the rent, save the amount paid, but the single contemporaneous unstamped receipt was made

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

out on a printed form containing particulars not only of the amount paid, but of the period covered by the receipt, and of the premises, and was headed "To be produced at next payment." Penalties were sought to be recovered in respect of eight of these unstamped receipts, and also in respect of one unstamped composite receipt, but the claim in respect of the latter was abandoned during the argument in the Court of Appeal. At the trial before Gibson, J., the only question raised was one of fact, viz., whether or not stamped receipts for the composite amount paid in respect of rent and goods were passed as alleged by the defendant. Gibson, J., concluded his report of the trial as follows:—"It being conceded (as I understand) that if stamped receipts covering the rent were passed, no penalties would be recoverable in respect of the documents produced, which, though on their faces purporting to be receipts, were not, in that view, in truth and fact receipts, I found for the defendant, as I thought on the whole his account more probable, and I entered judgment with costs accordingly."

During the argument in the Court of Appeal, Gibson, J., at the request of the Court, furnished a supplemental report, in which he stated:—

"If the defendant's story as to the stamped receipts was true, that was taken to dispose of the case, and no question was raised in that view as to the truth or sufficiency of defendant's explanation of the printed apparent receipts, nor was there any suggestion that they were in that view independent rent-vouchers, and tenable as effective receipts.

"My conclusion of fact was that the documents in dispute were stamped, passed, and accepted, as vouchers covering rent and goods together, and that the apparent rent receipts produced by Nolan were not intended to be, and were not, independent vouchers, being only intended to represent for convenience in a separate form the rent portion of the composite stamped receipts.

"I had no doubt that if a document apparently on its face a complete executed contract may be shown by oral evidence not to be a contract at all binding the parties [*Clever* v. *Kirkman* (1)], an apparent receipt could, *a fortiori*, be proved not to possess the character of an effective receipt or voucher."

(1) 33 L. T. (N. S.) 672; 24 W. R. 159.

Appeal. 1908. ATTY.-GEN. *v.* Ross.

The Attorney-General (*Right Hon. R. R. Cherry, K.C.*), *Serjeant O'Connor, K.C.*, *Molony, K.C.*, and *Coll*, for the Crown :—

This appeal has been brought because, we submit, the judgments of the King's Bench Division leave the law relating to the payment of duty upon documents, which are "receipts" within sub-sect. 1 of sect. 101 of the Stamp Act, 1891, in an unsatisfactory state. It has been assumed by the Court below that, when money is paid and a receipt passed, it is the transaction that is taxed, but that is not so; the duty is imposed, not upon the payment of the money, but upon the document acknowledging the payment; and when a number of receipts are given in respect of the same payment, each must be stamped, irrespective of the purpose for which it was given. The intention of the party giving the receipt has been wrongly introduced into the case, and is immaterial. In *Clever* v. *Kirkman* (1), referred to by Gibson, J., in his second report, the existence of a binding contract between the parties was in question, and there parol evidence of intention was admitted, but that case, as we submit, has no application. To allow a party who has omitted to pay duty upon a document which is a receipt within sub-sect. 1 of sect. 101, to give evidence that he did not intend the document to operate as a receipt, would open the door to fraud. The documents here in question clearly come within the words of sub-sect. 1 of sect. 101; they are accordingly subject to duty, and no consideration of hardship can affect the case: *Partington* v. *The Attorney-General* (2); *Attorney-General* v. *Carlton Bank* (3). The unstamped receipts are, in fact, the only proper vouchers for the payments of the rent in question, as they alone contain the necessary particulars. As to the course of the trial, the "understanding" of Gibson, J., that the Crown conceded that no penalties would be recoverable if, in fact, stamped receipts covering the rent were passed, cannot prevent this Court from now determining the question of law involved: *Philpott* v. *The Cork and Macroom Railway Co.* (4). The decision of the learned Judge at the trial, even as to the facts, is now open to

(1) 33 L. T. (N.S.) 672; 24 W. R. [159.
(2) L. R. 4 H. L. 100.
(3) [1899] 2 Q. B. 158.
(4) 4 L. R. Ir. 522.

reconsideration, and could be reversed. See judgment of Fitz-Gibbon, L.J., in "*The S.S. Gairloch*" (1).

Appeal. 1909.

ATTY.-GEN. *v.* ROSS.

D. S. Henry, K.C., and *W. H. Brown*, for the respondents:—

The only question tried and determined at the trial was the truth of the defendant's statement that he had given stamped composite receipts covering the rent; that question was determined in his favour, and the Crown should be held bound by the course of the trial. No doubt the words of sub-sect. 1 of sect. 101 of the Stamp Act, 1891, are wide enough to include the single unstamped documents in question; but in the words of Lord Trayner's judgment in *Day* v. *Glaister* (2), quoted by Bray, J., in *General Council of the Bar* (*England*) v. *Inland Revenue Commissioners* (3), "The terms in which the Stamp Act defines or describes a receipt, are very broad and comprehensive, but they are open to construction, and may, from the context, admit of qualification." Gibson, J., has held as a fact that the apparent rent receipts were not independent vouchers. That finding is not challenged, and accordingly the judgment for the defendant should stand.

THE LORD CHANCELLOR:—

Jan. 25.

This case raises an important question of principle on the construction of the Stamp Act, 1891, and the liability of documents in the nature of receipts for money to bear the first stamp provided for by that statute.

The short facts are the following:—The defendant's father was landlord of a man named Nolan, in respect of premises in Dundrum, for which Nolan paid a rent of £3 3*s.* 4*d.* per month, payable in advance, and he also supplied Nolan with milk, butter, and vegetables. Each month the defendant furnished Nolan with a composite account for the rent and goods, stating simply the amount of rent due, and the amount due for goods, bringing out the total sum. Nolan used to send a cheque for this amount, and he got back the composite account receipted, and, as we must now assume, stamped; and the defendant also sent him at the same time a document in the following form, inserting the appropriate dates:—

(1) [1899] 2 I.R. 13. (2) 2 F. 963, at p. 966. (3) [1907] 1 K.B. 462, at p. 477.

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The Lord Chancellor.

"To be produced at next payment.

"Received from Dr. T. P. Nolan, Moorfield, the sum of £3 3*s.* 4*d.* sterling, being one month's rent in advance, due to Joseph Ross, out of cottage No. 2, ending the 1st day of November, 1905. Received, 3rd day of October, 1905.—W. A. Ross."

And the sum due and discharged was brought out in the margin as £3 3*s.* 4*d.* This receipt bore no stamp.

There were eight of these receipts mentioned in the information, and eight penalties of £10 each were claimed in respect of these. The information also claimed in its second paragraph a penalty in respect of one other account—one of the composite accounts dated in November, 1905, alleged to be receipted, but not stamped; but the report of the learned Judge did not sufficiently deal with this, and the Attorney-General, during the argument before us, abandoned the claim as to this, and the information was treated as amended by cancelling this paragraph.

The defendant, in addition to "not guilty," pleaded a special plea—"Admitting, for the purpose of this defence, but not further or otherwise, that he did give what purported to be receipts to the said T. P. Nolan, they were duly stamped; and further, the documents referred to in said information were not receipts, but duplicates of receipts duly made and stamped, and delivered to the said T. P. Nolan."

Mr. Justice Gibson, before whom the information was tried without a jury, found as a fact that a stamped receipt was given for each composite account. The learned Judge in his report states that Mr. Coll, counsel for the Crown, stated in reply to him, that if defendant's statements were correct, he could not successfully contend that the defendant was liable to the penalty, and at the close of the case he gave judgment for the defendant, stating as his ground, "It being conceded (as I understand) that if stamped receipts covering the rent were passed, no penalties would be recoverable in respect of the documents produced, which, though on their face purporting to be receipts, were not, in that view, in truth and fact receipts, I found for defendant as I thought, on the whole, his account more probable, and I entered judgment with costs accordingly."

The Attorney-General moved in the King's Bench to enter

judgment for the Crown. It was contended for the defendant that the case was concluded by the finding in fact of the Judge; but the Court of King's Bench did not yield to this, and heard the case fully argued on the statute as applied to the facts. [His Lordship read the judgments delivered in the King's Bench Division, [1908] 2 I.R. 403.] During the course of the argument before us, Mr. Justice Gibson furnished to us a supplemental report, in which he states. [His Lordship read the supplemental report, and continued.]

We are all of opinion that, in the construction of this fiscal statute, the intention of the person who gives the receipt, or of the person who takes it, is immaterial, if the document unstamped comes within the language of the Act.

The tax is on the document, not on the transaction; and we do not think cases on contract apply.

Lord Cairns in *Partington* v. *Attorney-General* (1) says:—"I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be"; and he says that no equitable construction is admissible in a "taxing statute where you can simply adhere to the words." What is the legislation? [His Lordship read the Stamp Act, 1891, sections 101, 103.]

Each receipt in question here is given by the person to whom this rent is due to the person by whom it is due. It is given as an acquittance, and to be retained, and is directed to be retained. It will be seen that the receipt which I have read is a document independent and complete in itself. It does not refer to or incorporate any other document, nor does the other document refer to it. It satisfies every word in the statute which imposes liability.

The decision of the Judges in the King's Bench Division is

(1) L. R. 4 H. L. at p. 122.

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a contradiction of the document, but it is on that document as it is, and on its form, the liability under the statute rests. If that were not so, the Act could be evaded easily.

The Lord Chancellor.

It is well settled now, that fiscal statutes must be construed according to their grammatical meaning, irrespective of the consideration that a tax is imposed by them on the subject; see Lord Russell in *The Attorney-General* v. *Carlton Bank* (1)—"I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely, to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed."

The appeal must be allowed, and judgment given for the Crown for the eight penalties.

FITZ GIBBON, L.J.:—

My only doubt in this case arises from a feeling that the course of the proceedings has not been quite fair to the learned Judge who tried the case.

Gibson, J. was led to regard the trial as one of a single question of fact, namely, whether the defendant was telling the truth when he swore that he gave a stamped "joint receipt" for the same money which was included in each of the rent receipts which were the subject-matter of the information. The learned Judge "understood" that the counsel for the Crown conceded that, if the evidence of the defendant was true in this respect, the penalties claimed were not to be recovered; and he dealt with the case on that understanding.

It is an ugly feature in the case that the only "joint receipt" which was produced was unstamped. This throws doubt on the evidence of the person on whose information the proceedings were taken, because he has not produced any of the "joint receipts" which he admittedly received, except one which is not stamped. It is hard to follow the evidence of the defendant as to that document: he seems to have sworn that, in that single instance,

(1) [1899] 2 Q. B. at p. 164.

there were three receipts, and Gibson, J., believed him. But the Attorney-General in this Court has very fairly treated the information as not dealing with that particular document, admitting that the evidence as to it is not satisfactorily or fully presented to us upon the Judge's report, through his having been left under the impression that the claim for a penalty upon it was not pressed. We are therefore relieved from the necessity of considering that part of the case.

I feel that the conduct and course of the trial furnish strong grounds for saying, even against the Crown, that the parties should be held bound by the Judge's decision, and that they should not be allowed to re-open the matter; but for two reasons I am satisfied not to take that course—(1) A misunderstanding of the Judge as to a representation by counsel, in which the Attorney-General does not acquiesce, is not a sufficient reason for our not reviewing the trial. (2) The *ratio decidendi* of Gibson, J., and some statements in the judgments of the King's Bench, against the Crown, would leave the law as to the stamping of receipts in such an unsatisfactory state, that we ought to review the whole matter.

As to the law, I entirely concur with the Lord Chancellor. The real question is, whether each of the unstamped rent receipts was a document which came within the statutory description of a receipt which required a stamp. What it was must be decided upon the document itself, and by its own purport, contents, and nature, and not by the intention of the party who signed and issued it. Assuming that a stamped receipt was given for a joint sum of money which included the amount of the rent for which the unstamped receipt was given, the question remains whether the second document answers the description in the Act of Parliament. If so, it must be stamped. Here the particulars of the rent acknowledged to have been paid were contained, not in the stamped document, but in the unstamped document. The unstamped document was the only complete voucher, and it was "to be produced at next payment." It, and not the stamped document, was, in form and subtance, the formal acknowledgment and the regular voucher for the specified sum; and if the tenant wished to prove the payment of his rent for the specified period,

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he must have produced the unstamped paper, because the stamped one would not have enabled him to do so. In short, the unstamped receipt was the produceable and operative acknowledgment and discharge for the rent mentioned in it. Under these circumstances it is not open to the defendant to say that it was not liable to the stamp duty; or that he intended that it and the stamped document should be regarded as duplicates, or as merely complementary, making up but one receipt between them.

There may often be two papers which together form but one receipt, or one document may identify and refer to another, so as to show that one only is the real voucher. In such cases, two stamps will not be necessary—*e.g.*, where a stamped receipt is put in a covering letter which acknowledges the payment, and says, "I send you herewith a stamped receipt." But that is not the case here, and as the printed receipt is a formal and complete quittance for the debt, a penalty has been incurred by its not having been stamped, notwithstanding that another acknowledgment of the same with other money was given with a stamp upon it.

HOLMES, L.J.:—

This is an information in which the Crown seeks to recover a penalty of £10 for each of nine unstamped receipts given by the defendant to Thomas P. Nolan, whereby money amounting to £2 and upwards was expressed to have been received. The circumstances connected with one of these documents—that which forms the second paragraph of the information—have not been reported by the Judge; and as it would be unsatisfactory without some knowledge of the facts to give judgment thereon, the Attorney-General, at the suggestion of the Court, has consented to have the information amended by striking out this paragraph. Each of the other eight documents purports to be a receipt for £3 3*s.* 4*d.*, being one month's rent for a holding let by the defendant's father to Nolan, at a monthly rent payable in advance. They are in the printed form generally used in this country by landlords and their agents, with the blanks filled up by a correct description of the demised premises, and of the gale of rent for which the receipt is given. They are signed by the defendant, who acted for his father; and on their face, there is nothing

to suggest that they are supplementary to, or a duplicate of any other acknowledgment of payment. Nolan accepted them without objection; and probably this action would never have been heard of, were it not that ill feeling arose between him and the defendant, caused by legal proceedings taken by the latter against the former. Thereupon, Nolan gave information to the Department of Inland Revenue, which led to these proceedings. The defence was, that the defendant had given stamped receipts for the several payments mentioned in the documents relied on by the Crown, and that these documents were not receipts but duplicates of receipts duly made, stamped, and delivered to Nolan. His evidence at the trial was, that his father supplied Nolan with vegetables, eggs, and other farming produce; that at the beginning of each month he furnished an account of the sums due therefor during the previous month, including therein the rent payable in advance for the following month; that Nolan thereupon returned the account, with a cheque for the full amount, which was sent back receipted and stamped, and that this was accompanied with the receipt already referred to, for the rent as a separate item.

Gibson, J., who tried the action, reports that, although at first he thought this story was hardly credible, his ultimate conclusion, arrived at not without doubt, was in the defendant's favour; and his finding on this question of fact has not been challenged. I have no doubt from the Judge's report that counsel for the Crown admitted that if the defendant's story was true, no penalties would be recoverable; but I also gather that, apart from this admission, Gibson, J., decided that in the view he took of the facts, the law was against the Crown. The Attorney-General, feeling the effect which this decision might have in other cases, moved in the Divisional Court to enter judgment for the Crown; and although Mr. Henry contended on behalf of the defendant that no further proceedings could be taken after the admission I have mentioned, the King's Bench Division declined to accept this proposition; and, after hearing the legal question fully discussed, affirmed the view taken by Mr. Justice Gibson.

In considering this appeal, we must assume that contemporaneously with the document dealing exclusively with the rent,

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there was also sent by the defendant to Nolan a document containing, in addition to other items, the amount of the rent, and that this was duly receipted and stamped. Did this fact relieve the defendant from the obligation of affixing a stamp to the other document? I think the answer is to be found in sect. 101 of the Stamp Act of 1891, which provides "that for the purposes of the Act 'receipt' includes any writing whereby any money amounting to two pounds or upwards is acknowledged or expressed to have been received or deposited, or paid, or whereby any debt or demand, or part of a debt or demand, of the amount of two pounds or upwards is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment." Notwithstanding some old judicial dicta, it is, I think, now settled that the language of a taxing Act must be construed in the same way as that of any other statute. We are to ascertain its natural meaning and enforce its provisions as thus interpreted. Taking, then, the writing relating to the rent alone, does it not acknowledge or express that £3 3*s.* 4*d.* has been received—does it not signify or import an acknowledgment of the discharge of a debt of that amount? It is impossible to give it any other construction. If so, according to the Act, it ought to bear a penny stamp; and as it was not so stamped, the person giving it—that is the defendant—incurs a fine of ten pounds.

Gibson, J., holding as an inference of fact that it was not intended by either party that the document in question should be a receipt, decided that it need not be stamped. In support of this view he has referred to cases in which, notwithstanding documents showing a completed contract, it was held that there was no contract, inasmuch as there was no real agreement between the parties. This is in strict concordance with legal principle. Contract arises from a concurrence of the minds of the contracting parties; and where this does not exist there is no contract. But in the definition of a receipt which I have quoted, there is nothing to suggest that it depends on the intention of the persons who give and take it. The contents of the document are made the test. It is not merely possible, but I think it often happens, that although there is something in writing which, if taken by itself, might amount to an acknowledgment of the receipt of money or a cheque, the whole of

what is written shows that this is not so—we are all familiar with the kind of letter received after sending money or its equivalent in payment of a sum due, in which we are thanked for our communication, and told that a receipt is sent therewith. In such cases the letter speaks for itself, and shows that it is not a receipt within the meaning of the definition. The Lord Chief Justice places his judgment on a different ground—namely, that where there is only a single payment the Legislature intended that there should be only one stamped receipt. But the stamp is not imposed on the fact of payment. Money far in excess of £2 is often paid in satisfaction of a debt without a receipt; and no stamp is needed. The stamp is to be borne by any document that imports the acknowledgment of payment, and whether there be two or more such documents, each must bear the stamp. To return to the facts of the present case, the rent receipt is complete in itself, and refers neither directly nor indirectly to any other writing; nor is it alleged that the contemporaneous paper refers to it. If we were to hold that it need not be stamped, it would not only afford an easy means of defrauding the Revenue, but, what as to the law of the case is much more essential, it would violate the clearly expressed provisions of the statute.

Solicitor for the Crown (appellant): *The Solicitor of Inland Revenue.*

Solicitor for the defendant: *Gerald Byrne.*

R. ST. J. C.

K. B. Div. 1909.

Jan. 22, 25, 26. Feb. 11.

THE KING (CHARLOTTE ELIZABETH HINDS AND JANE HINDS) *v.* THE ESTATES COMMISSIONERS.

THE KING (STEPHEN EDWARD COLLIS) *v.* SAME (1).

Land purchase—Evicted tenants—Estates Commissioners—Voluntary offer—Compulsory purchase—Evicted Tenants (Ireland) Act, 1907 (7 *Edw.* 7, *c.* 56), *sections* 1 *and* 2.

The Estates Commissioners are not bound to make an independent offer to the owner, under section 1 of the Evicted Tenants (Ireland) Act, 1907, as a condition precedent to putting in operation the machinery for the acquisition of land compulsorily under section 2 of that Act.

Madden, J., *diss.*

In each of these two cases the prosecutors sought an absolute order that a prohibition do issue to the Estates Commissioners prohibiting them from continuing proceedings under section 2 of the Evicted Tenants (Ireland) Act, 1907, for the compulsory acquisition of land required for the purposes of the Act, on the ground that, not having made any such offer for the purchase of the lands as was prescribed in sect. 1 of the Act, they had no jurisdiction to proceed to the compulsory acquisition of the lands. The first-named case came before the Court upon notice of motion, served by leave of the Court, and the second was argued upon notice to make absolute a conditional order.

The Right Hon. J. H. Campbell, K.C., Moore, K.C., and *Barry Meade*, for Elizabeth and Jane Hinds.

Serjeant O'Connor, K.C., and *Vincent Rice*, for Collis.

Ronan, K.C., Jellett, K.C., De Renzy, and *Babington*, for the Estates Commissioners.

(1) Before Lord O'Brien, L.C.J., and Madden and Wright, JJ.

The following cases were cited:—*Kemmis's Estate* (1); *Close's Estate* (2); *Metropolitan Asylum District* v. *Hill* (3); *White's Estate* (4); *Wilson's Estate* (5); *Guest* v. *Poole & Bournemouth Railway Co.* (6); *In re Uxbridge & Rickmansworth Railway Co.* (7).

WRIGHT, J.:—

The question raised here is, whether the Estates Commissioners were bound to make an offer to the owner to buy the lands under section 1 (1) of the Act of 1907 (7 Edward 7, c. 56), as a condition precedent to instituting proceedings under section 2 of that Act.

That question, in my opinion, depends mainly, if not entirely, upon those two sections; and while we have been referred in the argument to several sections of various Irish Land Acts, particularly the Act of 1903, and cases decided on them, the answer to the question must in the end be got mainly from these two sections of the Act of 1907, with any assistance that may be got from similar expressions in other Acts, as judicially interpreted. Section 1 declares that the Estates Commissioners shall have power to acquire lands compulsorily for the purposes of the Act if, to paraphrase the language of the section, efforts for a voluntary purchase have failed. What those purposes are is set out in sub-section 2 (*a*) and (*b*) of the same section, and sub-section 3 excludes from the Commissioners' power of compulsory acquisition tenanted lands, except in certain cases and under certain conditions, and lands subject to an annuity for the repayment of an advance under the Land Purchase Acts.

Section 2 is a very long section and contains very elaborate provisions for acquiring land.

Under that section the first step is the publication by the Commissioners of a notice in the *Gazette*, which is to be served upon the person appearing to them to be the owner of the land, and upon all persons known or believed by them to be interested therein. Thereupon, *i.e.* as soon as the notice has been published, their

(1) [1904] 1 I. R. 496, 500.
(2) [1905] 1 I. R. 371.
(3) 6 A. C. 209.
(4) [1906] 1 I. R. 186, 193.
(5) 42 I. L. T. R. 122.
(6) L. R. 5 C. P. 553.
(7) 43 Ch. D. 536.

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Wright, J.

inspectors can enter on the lands, and examine and report on them; and on consideration of their report and other matters as specified in sub-section 4, the Estates Commissioners may make an offer to the person appearing to them to be the owner to purchase the lands.

Is this offer, made at this stage, the same offer that is mentioned in section 1, or another and a later offer?

The difference in the language used in the two sections has been pointed out and commented on. Section 2 says the offer is to be "at such price as appears to them, *prima facie*, to be a reasonable price." Section 1 says—"If they have offered a price which appears to them to represent the value." I do not think there is here any difference of meaning. It seems to me to be only a difference of phrase or form of expression; the same thing is meant. I do not think the question raised can be determined by any such variance of words. Until the publication of notice in the *Gazette* the Commissioners have no power to send their inspectors on the lands, and cannot have a report as to the suitability of the land, its capacity, or the many other matters which ought to be before an intending purchaser for his guidance. Without such a report, which, prior to publication of this notice, cannot be got as a matter of right, they cannot be said to have before them adequate materials for making a real offer; it is difficult to see how they could name a price which would represent or approximate to the value of the land.

Section 1, as I have already stated, gives the Commissioners compulsory power to purchase, when negotiations for a free sale have failed; it defines the purposes for which land is to be acquired, and states what lands can, and what lands cannot, be compulsorily acquired.

The machinery of purchase is undoubtedly prescribed in section 2. Does it include both cases—free sales and compulsory purchase? The opening words of the section are certainly opposed to that view: "Where it is proposed that any land shall be acquired compulsorily under this Act"; just as in section 1 the making of an offer, and the refusal of that offer, would seem to be made conditions precedent to putting in force the powers of compulsory purchase.

Under the heading of section 2, to which I have just adverted, follow numerous sub-sections regulating the procedure. First of all, notice must be published in the *Gazette*, and a copy of such notice must be served upon the person appearing to the Commissioners to be the owner, and upon all persons known or believed by them to be interested in the lands; and if no petition is presented against the proposed acquisition within the prescribed time, the offer becomes accepted, and the purchase-money is paid into the Bank of Ireland.

There is no definition in the Act of the phrase, "person appearing to be the owner." It closely resembles the language used in sect. 17 of the Land Purchase Act of 1903, which speaks of an intending vendor who gives *prima facie* evidence that he has power to sell, and satisfies the Land Commission that he has been in receipt of the rents and profits for the six immediately preceding years. In both sections the same intention is shown, namely, to effectuate a speedy sale, and convert the land into money, with as little loss of time as possible.

Sub-sections 7 and 8 and the following sub-sections of section 2 deal with the procedure to be taken where a petition against the acquisition of the lands has been presented, and where undoubtedly the lands are being compulsorily acquired. Is the land taken compulsorily where, after notice in the *Gazette*, an offer is made to the owner and is accepted? Or, does the acquisition become compulsory only after the offer has been refused, such refusal being evidenced by the presentation of a petition against the acquisition of the land?

We have been referred to two English cases:—*Guest* v. *Poole and Bournemouth Railway Co.* (1), in which it was held that a notice to treat under the Lands Clauses Act (8 Vict. c. 18) is not necessarily an exercise of the powers of the Act in relation to the compulsory taking of land:—"A notice to treat assented to by the landowner would not be an exercise of the compulsory powers; but a notice to treat, not assented to, in which case the Company would be placed in a situation of hostility to the landowner, would be" (*per* Brett, J., at p. 560); and in the later case, *In re Uxbridge and*

(1) L. R. 5 C. P. 553.

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Rickmansworth Railway Co.(1), decided twenty years after, the law as to the effect of service of a notice to treat was regarded as settled by the first cited case. I refer in particular to the judgment of Lord Justice Cotton, at p. 563 :—"Then has there been an exercise of the compulsory powers? It is very true the power to give notice to treat is included in that group of sections in the Lands Clauses Act, headed 'And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows.' Then there follows a direction that the promoters of the undertaking shall give a notice to treat in respect of the lands they require to take. But, although the direction to give notice to treat is included within the group of clauses, there may never be any step taken as regards the exercise of compulsory powers; because, if the Company have not got their capital subscribed they cannot exercise any compulsory powers, and the notice to treat, as was the case in one instance here, may be merely a step taken towards an agreement with the land-owner in order to ascertain whether he is willing to make the contract with the railway company, the company saying, 'I want the land; will you sell it to us?' In my opinion, it cannot be said that that alone is an exercise of compulsory powers."

The sections there discussed were sections 16 and the following sections of the Lands Clauses Act (8 Vict. c. 18). Section 16 of that Act is prefaced by words certainly as strong as the prefatory words of section 2 of the Act of 1907, "and with respect to the purchase and taking of lands, otherwise than by agreement, be it enacted as follows"; section 18, which deals with the notice to treat, is, as Lord Justice Cotton points out, one of the group of sections so headed. Compare with this the introductory words of section 2 of the Act of 1907, "where it is proposed that any land shall be acquired compulsorily under this Act." The similarity is very striking, and the principle of the English cases to which I have referred, which are undoubtedly very strong decisions, having regard to the effect upon the land of service of notice to treat, in my opinion applies strongly to the question before us: *In re Marylebone Improvement Act*; *Ex parte Edwards* (2).

(1) 43 Ch. D. 536. (2) L. R. 12 Eq. 389.

The power to acquire compulsorily, for the purposes and within the limits laid down by section 1, is undoubtedly possessed by the Commissioners, just as in the case of a Railway Company the power is in the promoters; the notice in the *Gazette* which is served on the apparent owner says in effect, "We, the Estates Commissioners, want the land, and we have power to take it. Will you sell? We offer you the following price, which seems to us to be a reasonable one, and which in our opinion represents the value of the land." If this offer is accepted, then, applying the principle of the English decisions, it is not a case of compulsory purchase; the power was always there, but, as the parties agreed and the offer was accepted, the necessity for compulsory purchase did not arise.

I am accordingly of opinion that there is only one offer under the two sections, and that is an offer made after publication of notice in the *Gazette*, and after the Commissioners have been enabled to send their inspector upon the lands and receive his report, that both classes of sales, voluntary and compulsory, are within section 2, and are provided for by it, and that if the offer is accepted there is no exercise of, and no occasion to exercise, compulsory power, though the power to so acquire the lands is in the Commissioners, and is, as it were, held in reserve.

I think the order ought to be discharged.

MADDEN, J.:—

The opening words of the 1st section of the Evicted Tenants Act of 1907 are sufficiently wide to apply to any land which the Estates Commissioners may think it expedient to acquire for the purposes of the Act. It contemplates the making of a bid or offer by the Commissioners to the person appearing to them to be the owner of the land. The amount offered by the Commissioners is described as the price which appears to them to represent the value of the land. If the sum so offered is accepted by the owner, no question of compulsory purchase or of adequacy of price arises. If the offer is not accepted within the prescribed time, it then becomes necessary to distinguish between two classes of land:—

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(*a*) land in regard to which the compulsory powers conferred on the Commissioners by this statute can be put in force; and (*b*) lands excluded from the operation of these compulsory powers by section 2, sub-section 3, and section 7, of the Act. If the land for which an offer has been made does not come within the exceptional provisions of either of these sections, the Commissioners may "acquire that land compulsorily for those purposes, in accordance with the provisions of this Act, and shall declare any land so acquired to be an estate." Should a question arise as to whether the restrictive provisions of the statute refer to the land in question, an appeal from the decision of the Commissioners lies either to the going Judge of Assize, or to a Judge of the King's Bench Division placed on a *rota* for the purposes of the Act.

If the 1st sub-section of section 1 were taken by itself, there could be no reasonable doubt as to its construction and effect. It prescribes in apt language the conditions on the fulfilment of which the Commissioners may put in force their compulsory powers. From the language used, as well as from the necessity of the case, these conditions must be taken to be conditions precedent to the exercise of these powers. The compulsory acquisition of property is against common right. It can only be effected under statutory powers, and where the statute prescribes the conditions under which compulsory powers are to come into existence, and be exercised, those conditions must be fulfilled. Counsel for the Commissioners have not succeeded in showing any ambiguity in the language in which these conditions are prescribed. They are three in number—(1) "If it appears to the Commissioners that it is expedient to acquire any land for the purposes of this Act, (2) and if they have offered to the person appearing to them to be the owner of the land a price which appears to them to represent the value thereof, and (3) he has not within the prescribed time accepted the offer." When these three conditions have been fulfilled, then, and not until then, the compulsory provisions of the Act may be put in force.

I do not understand the counsel who have argued this case on behalf of the Commissioners to dispute the very obvious proposi-

tions to which I have given expression. Their argument does not go to show that these conditions need not be fulfilled; on the contrary, they contend that they are in course of fulfilment by the Commissioners, and that when the process of compulsory acquisition has been completed, it will then be found that all the conditions prescribed by section 1, sub-section 1, have been complied with. The mode which they have adopted of complying with these conditions is, they say, supplied by the 2nd section, which furnishes the machinery without which the 1st section would be practically unworkable.

The introductory words to the 2nd section are different from those with which the 1st section begins. It applies "where it is proposed that any land shall be acquired compulsorily under this Act," while the 1st section includes in its operation "any land." The reason for this difference is obvious. Any land may be acquired by voluntary sale, and the 1st section includes purchases by free contract, as well as compulsory sales. In the case of land of the excepted classes, when the offer of the Commissioners is accepted, the result is voluntary sale, as the result of free contract. In the case of other land the acceptance is voluntary only so far as the ascertaining of price is concerned; for the alternative to voluntary arrangement is compulsory purchase, at a price which need not be offered to the owner for acceptance, because, when ascertained in accordance with the provisions of the Act, he cannot reject it. The precise point at which the procedure for compulsory purchase, prescribed by section 2, comes into operation, is upon the non-acceptance within the prescribed time of an offer made to the apparent owner, who is to be ascertained in the manner which I shall point out.

Before this procedure can be put into operation, a preliminary question must be decided if raised by the owner, that is to say, whether the land is capable of being compulsorily acquired. The 1st section is clear on this point. The compulsory acquisition of land is expressed to be subject to the provisions as to appeal contained in the Act, where a question arises under the provisions imposing restrictions on the acquisition of land. The mode in which this question should be raised for determination by an owner to whom an offer is made, is a matter to be prescribed by

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rule. The important matter to note is, that the decision of this question, as well as compliance with the conditions to which I have referred, are matters precedent to the compulsory acquisition of land.

The 2nd section is not (as I have already noted) generally conversant with the acquisition of any land; it begins with these words, "When it is proposed that any land shall be acquired compulsorily under this Act." Without going through the provision of this section 2 in unnecessary detail, I may say that it prescribes in the 1st sub-section, the publication in the *Gazette* of a notice affording to persons interested an opportunity of objecting to the acquisition of the land in question under the Act. This notice in its nature excludes the idea of voluntary sale by an owner, inasmuch as an objection made under the sub-section may be overruled by the Commissioners, subject, in certain cases, to appeal. The 2nd sub-section is as follows:—"A copy of the aforesaid notice shall be served by the Estates Commissioners as soon as may be, in the prescribed manner, upon the person who appears to them to be the owner of the land, and upon all persons known or believed by them to be interested therein." The 3rd sub-section gives power to the Commissioners to inspect the land "any time after the publication of the aforesaid notice," in order to enable them to determine whether it is suitable for the purposes of the Act, and to estimate the price thereof. The 4th sub-section provides that if the Commissioners, as the result of inspection, consider that the land is suitable and no valid objection has been raised to its acquisition "they may, if they think fit, make an offer to the person appearing to them to be the owner of the land, for the purchase thereof at such price as appears to them *prima facie* to be a reasonable price."

It will be observed that what is called an "offer" in the sub-section, unlike that mentioned in section 1, need not be communicated to the person appearing to be the owner of the land. No question arises as to his acceptance or rejection of what is not in any real sense an "offer," but is correctly described in sub-sect. 5 as the price at which the Commissioners intend to acquire the land. The sum to be estimated under sub-section 4 is not the amount which the Commissioners would be prepared to bid for the land,

but the sum which appears to them *prima facie* to be a reasonable price, after they have, in accordance with the 3rd sub-section, inspected the land, and done all such things as may be necessary for the purpose of enabling them to estimate the price thereof. The 8th sub-section provides that any person aggrieved by the determination of the Estates Commissioners fixing the price may appeal to the Judicial Commissioner, who is finally to determine the price at which the land is to be compulsorily acquired.

I now turn to the 1st section, and I find that the offer with which it is conversant differs in essential particulars from the price judicially determined under the provisions of the 2nd section.

The sum of money offered by the Commissioners as the price of the land is to be the amount which appears to them to represent the value thereof. It is not a price judicially ascertained *inter partes*, but a sum of money estimated, like any other bid, from the point of view of the intending purchaser, having regard, of course, to the nature and quality of the land which it is proposed to acquire and to the probability of its acceptance. The estimated price under section 2 need not be laid before the owner in the form of an offer, for the sufficient reason that it is not an offer, but a judicial determination as to value from which the owner is at liberty to appeal. The owner may accept the adjudication of the Commissioners as to the price which is *prima facie* reasonable; or he may obtain a decision on appeal to which he must submit. If the adjudication of the Commissioner is communicated to the owner—a matter which is left optional—it is not as an offer to be accepted, but as an adjudication subject to appeal.

Notwithstanding these essential differences between a bid and a judicially ascertained price, the Commissioners insist that they are at liberty to substitute the latter for the former in acting under the Act. This can only be done by ignoring the provisions of the 1st section, read in their ordinary signification, and the Commissioners attempt to justify this action by showing that the provisions of the 1st section, taken by themselves, are incapable of being applied in practice, and that in order to give them effect, recourse must be had to the machinery

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provided by section 2, beginning with the publication of the statutory notice under the 1st sub-section. *Lex non cogit ad impossibilia.* It is therefore necessary to consider in detail each of the three conditions which the first section prescribes, as precedent to the exercise of compulsory powers, in order to ascertain whether the Commissioners are absolved from complying with them by reason of difficulties which would render compliance practically impossible.

The section begins thus, "If it appears to the Estates Commissioners that it is expedient to acquire any land for the purposes of this Act." It is said that a determination of the Commissioners as to the expediency of acquiring any particular parcel of land, presupposes such an inspection and examination as is prescribed under section 2, which can only be had, unless by consent, after the publication of notice under sub-section 1 of section 2. But it is quite clear that the service of this notice precedes inspection, and its service is founded upon an antecedent determination as to expediency precisely the same as that contemplated under section 1. No doubt the question as to the expediency of purchase is concluded by the acceptance by the owner of the offered price. But there can be no great practical difficulty in the way of the Commissioners acquiring sufficient information as to any untenanted land, from the Ordnance Survey and the valuation, and local inquiries, sufficient to satisfy them that it is expedient to acquire it at a suitable price. The Land Commission must exercise a similar discretion in acting under section 8 of the Irish Land Act of 1903, by which they are empowered to purchase untenanted land for the purpose of facilitating the resale or redistribution of purchased estates. But at all events, there is no insuperable difficulty in complying with the requirements of the 1st section of the Act; no difficulty, in fact, greater than that which lies in the way of a willing purchaser who makes a bid for property of which he has no power to obtain valuation or inspection, or than that which is in the way of the Land Commission when they propose to purchase untenanted land under the 8th section of the Act of 1903.

The difficulties which have been raised with regard to the third condition seem to me to be removed when the difference is realized

between a bid and a judicially ascertained estimation of fair price. The sum offered by a would-be purchaser under ordinary circumstances is never in excess of what he estimates as the value to him of the land which he wishes to acquire. It seemed to be assumed through the arguments on behalf of the Commissioners that they would be acting judicially in estimating as between them and the owner the amount to be offered for the land. They ought, of course, to act fairly in making an offer, which an owner might reasonably be expected to accept. But the adequacy of the offer from the point of view of the owner is a matter for his consideration, and if he considers the amount offered insufficient, his non-acceptance will put in motion the machinery provided by section 2, resulting in a judicial decision as to what is, between vendor and purchaser, a reasonable price.

I now proceed to consider the second of the conditions prescribed by the 1st section. The offer is to be made to the person appearing to the Commissioners to be the owner of the land. If the 1st section of the Act of 1907 stood by itself, and were not incorporated with the Land Act of 1903, it might fairly be contended that the difficulty in complying with this condition would be so great as to prove practically insuperable. The difficulty would arise, not from any ambiguity as to language of the Act in prescribing the conditions precedent to compulsory purchase, but from the circumstance that the Legislature had failed to provide the means of complying with those conditions. But the Act of 1903 contains a power, vested in the Judicial Commissioner and the Estates Commissioners, of making rules, subject to the approval of the Lord Lieutenant, and after consultation with the President of the Incorporated Law Society, for carrying the provisions of the Act into effect (sect. 23, sub-sect. 13). These powers are applicable to the incorporated Act of 1907.

It may be true that it would not be possible, without an exercise of such a power, to carry into effect the provisions of the 1st section. Such a power not only exists, but its exercise in relation to this section was expressly contemplated by the Legislature, for the time given to the owner for acceptance of the offer is that to be "prescribed" by rules under the section to which I have referred.

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As I read the statute, the first thing to be done by the Commissioners in relation to any parcel of land which they may consider it expedient to acquire is to ascertain the person who may appear to them to be the owner of the land. This must be done for the purpose of the offer under section 1. If this offer is not accepted within the prescribed time, the apparent owner, so ascertained, must be served with the notice in the *Gazette*, which can, in such event, be published under section 2, sub-section 1, and he may or may not be the subject of a subsequent "offer" of the judicially ascertained reasonable price under sub-section 4. It is the duty of the rule-making authority to provide for the ascertainment of this "owner" for the purposes of section 1. When so ascertained, he can be made the subject of proceedings under section 2 in the event of it being necessary to put into force the compulsory provisions of the Act.

It rests with the rule-making authority to determine under what conditions a person in possession of untenanted land should be regarded by the Commissioners as appearing to them to be the owner. It is represented as a startling proposition that the price of land compulsorily taken should be fixed by any one other than the person conclusively ascertained to be the owner. This may be so, but the time to be startled was when the 17th section of the Act of 1903 was passed—a section which affords a clue to what was intended by the Legislature when it passed the 1st section of the Act of 1907. That section empowers the Land Commission to deal with an apparent owner, who satisfies the requirements of the Act. He may, after investigation of title, prove not to be the owner. But a dealing between him and the Commissioners has the effect of converting the land into money, leaving the true owner to assert his rights against the purchase-money.

The requirements of this statute are—*prima facie* evidence of power to sell under the Land Purchase Acts, and satisfactory proof of possession for a period of not less than six years antecedent to purchase. Section 17 of the Act of 1903 contemplates that these requisitions should be satisfied by the vendor. In a proceeding under the Act of 1907, the information must be obtained by the Commissioners as best they can. Possession of untenanted

land is *prima facie* evidence of seisin in fee; but something more than this would no doubt be required. Possession for a period of time such as that prescribed by section 17 of the Act of 1903 or by rules to be made under the Act of 1907 is a matter of fact, in regard to which the Commissioners may in some few cases have a difficulty in satisfying themselves. They might safeguard their action by prescribing notices and by advertising; but I am clearly of opinion that they cannot call in aid, as they have done in the present case, a notice served under the 1st sub-section of section 2.

Suppose the Commissioners desire to acquire some untenanted land which the owners might be in a position to bring under one of the exempted classes, as forming part of a demesne or being a town park. The selection might be made in perfect good faith, and under a misapprehension as to a question which is often of considerable difficulty. If the contention of the Commissioners is right, they can, by means of publication of a notice such as that in the present case, acquire an immediate right compulsorily to inspect any land whatever, whether exempted or not from compulsory purchase, although the question of exemption is referred to in section 1 as the subject of adjudication and possible appeal, in language which to my mind imports that all this procedure should precede any action of a compulsory character. On this ground alone I regard the service of the notice in this present case as an unlawful act.

If I am right in the view which I have taken of the 1st section of the Act, the result of the acceptance of an offer made under its provisions is the immediate conversion of the land into money; the vesting of the land in the Commissioners for the purposes of the Act; the lodgment of the money in Court; and the transference of the claims of all persons interested as from the land to the purchase-money. The object which the Legislature had in view in requiring an offer to be made to the apparent owner was not to present to him the option of voluntary sale, for, as I have pointed out, the alternative of acceptance is compulsory sale; and the acceptance of an offer under these circumstances can hardly be called a voluntary sale. The purpose which the Legislature had in view in enacting that the

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making by the Commissioners of an offer or bid to the apparent owner of land which they desire to acquire should be a condition precedent to the putting in force of compulsory powers appears to be two-fold:—(1) The making of this offer afforded to the owner an opportunity of raising at once the question whether the land in question was capable of being acquired compulsorily. The decision of this question, if raised by the owner, would naturally precede the service of a notice under section 2, which could only be served if the point was decided against the contention of the owner. (2) From the point of view of effecting the purposes of the Act, this preliminary bid had an obvious advantage. Its acceptance would render it possible for the Commissioners to enter into immediate possession of the purchased land, without the protracted proceedings which might be the result of compulsory purchase under the provisions of section 2. This consideration would naturally lead to the making of a bid on the part of the Commissioners of an amount which might, perhaps, not be at once accepted, but which might be made the basis of negotiations leading to an ultimate acceptance of a modified offer.

I have come to this conclusion upon consideration of the provisions of the Act of 1907, taken in connexion with the remainder of the code of which it forms part, and read in the light of the manifest policy of this legislation. The legislation is admittedly exceptional in its character, intended to deal with an exceptional state of things; and I do not think that assistance can be derived from decisions upon statutes essentially different in the purposes for which they were passed, and in the procedure which they prescribe.

For the reasons which I have stated, I am of opinion that the Commissioners were not justified in omitting to comply with a condition precedent to the exercise of compulsory powers prescribed by the 1st section of the Act; that they acted illegally in publishing in the *Gazette* the notice under the 2nd section of the Act, and thereby bringing into exercise their compulsory powers; and that the writ of prohibition should issue.

LORD O'BRIEN, L.C.J. :—

This is certainly very far from being a clear case.

It is not necessary for me to refer to the cases with which my brother Wright has dealt; those cases, I mean, to which Mr. Ronan called our attention after the argument had concluded. They are, in my opinion, useful and relevant; but my brother Wright has dealt with them exhaustively, and mere repetition would serve no useful purpose.

I shall content myself with dealing with the 1st and 2nd sections of the Act of 1907, c. 56, upon the true construction of which the controversy before us depends. Taking, then, sub-section 1 of section 1, the first observation that I make is, that it is, I may say, self-contained; it does not refer to any prescribed rule or regulation except one—the rule which may prescribe the time for the acceptance of an offer. It does not directly, nor, in my opinion, indirectly, nor impliedly, refer to any rules or regulations prescribed or to be prescribed by the Act of 1903. It is as follows:—"If it appears to the Estates Commissioners that it is expedient to acquire land for the purposes of this Act, and if they have offered to the person appearing to them to be the owner of the land a price which appears to them to represent the value thereof, and he has not within the prescribed time accepted the offer, they may, subject to the provisions as to appeal contained in the Act, acquire the land compulsorily for those purposes, in accordance with the provisions of this Act, and shall declare any land so acquired to be an estate."

The only rule referred to here is a rule to be prescribed with reference to the time within which the offer mentioned in the sub-section may be accepted. It is not pretended that the owner could, by any mere rule or regulation, be compelled to permit entry upon, and inspection of, his estate. Nor is there any rule prescribed with reference to the ascertainment of the owner of the estate. Now, then, comes the question we have to determine—Is the offer mentioned in the 1st sub-section of section 1 one and the same as the offer mentioned in sub-section 4 of section 2? In my opinion,

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it is. There is but one offer to be made and not two. If the offer contemplated by the 1st sub-section of section 1 is, as has been said, in the nature of a bid founded upon mere speculation as to value, the legislation is indeed of a strange and eccentric character. It would come to this—that a public department, spending public money, was authorized by Parliament to make a bid for a thing it knew practically nothing about; because it is conceded that if there are to be two offers, in regard to the first offer, the Commissioners have not the powers conferred by sub-section 3 of section 2 of the Act of Parliament. No mere rule or regulation does or could confer such powers. No doubt it might be competent for the Commissioners to send an inspector to drive round the country, and if he could do so from a road or by-way, to take a look at land intended to be acquired; but he would have no power to enter upon the land and inspect it for the purposes of a report.

To ascertain whether the land in question was suitable for the purposes of the Act, and to fix a price for it, would necessitate the very closest inspection; and without the power to make this inspection, is it to be said that a public department, in the exercise of an authority to spend public money, is to make an offer to purchase? Not only would the offer be illusory, but the expenditure of public money proposed to be made by such an offer would be unparalleled in the history of our law. In fact, a public department, created to purchase land out of public money would be justified in guessing at the value without having the materials even to make a guess. I think it was Lord Halsbury who said that we should regard the Legislature as an ideal person. But if it authorized a public department to spend money in the purchase of land it had no right to enter upon and closely inspect, I fear we should be obliged to substitute the term "fantastic" for the word "ideal."

But to whom is the offer to be made? "To the person appearing to the Commissioners to be owner of the land." There are, as I said, no rules or regulations referred to in sub-sect. 1 of sect. 1 of the Act. The only thing to be prescribed is the time within which an offer is to be accepted. According to the argument they may

make an offer to the person who merely appears to them to be the owner, without reference to the provisions contained in section 2 of the Act. I cannot bring myself to believe that this can be done. Is it to be said that a person who merely appears to the Commissioners to be the owner, but in fact is not, can effectively accept an offer? The person who can do this is the person who appears to the Commissioners, after careful investigation, to be the owner. But they are not to pick up an owner at haphazard. My view of the Act is this:—that sections 1 and 2 of the Act are to be read together, that the only way of ascertaining the price which represents the value of the land is the way pointed out in sub-sections 2 and 3 of section 2 of the Act. "Value," the word used in section 1, and "price," the word used in sub-section 3 of section 2, are in my opinion, convertible terms. The phraseology is different, but the meaning is one and the same. No doubt the case is a difficult one. The Act is far from being as clear as it might be; but we must give it a reasonable construction, and we certainly should not be doing this if we were driven to hold that there were to be two offers: the first offer, as I said, would be made under the most unreasonable conditions—in the absence of any real knowledge of the thing for which the offer was made, and to a person whom there was no real reason for believing to be the owner.

I think that the machinery provided by the 2nd section, taken as a whole, taken in its entirety, aimed at compulsory purchase; but that if the offer contemplated in sub-section 4 of the 2nd section of the Act was accepted, then that acceptance had the effect of arresting the process that was leading to compulsion, and of making the question of purchase no longer a compulsory matter. No question then remained as to forcing a price upon an unwilling owner—upon the person who appeared to be owner after exhaustive investigation; and in that case the offer being accepted within the meaning of the 1st sub-section of section 1 of the Act, there was no need for compulsion within the meaning of the closing sentence of that sub-section. I assume that the acceptance of the offer made is unqualified, and that no other controverted question remains open.

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No doubt, if there were not an unqualified acceptance of the offer made, or any other controverted question remained open, the machinery specified in the 2nd section would have worked on compulsorily throughout; but once the offer was accepted and no other question remained open, it was no longer necessary, in the words of the 1st sub-section, "to acquire the land compulsorily."

Reading together sections 1 and 2 of the Act, this is the view I take of the effect of their provisions.

No doubt the case is, as I have said, a difficult one; but I think the language of the Act is sufficiently tractable, sufficiently malleable, to enable us to avoid the extraordinary consequences, indeed I might say the absurdities, which would flow from a different conclusion.

Solicitors for Hinds: *Crookshank, Leech, & Davies.*
Solicitors for Collis: *Creagh & Byrne.*
Solicitor for the Estates Commissioners: *W. Alexander.*

J. L.

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THE KING (COURTENAY) *v.* THE JOINT COMMITTEE OF MANAGEMENT OF THE CARLOW DISTRICT LUNATIC ASYLUM (1).

District Lunatic Asylum—Resident Medical Superintendent—Temporary appointment—Joint Committee of Management—Mandamus—"Proceeding"—Local Government (Ireland) Act, 1898, *ss.* 9, 84—*Lunacy (Ireland) Act*, 1867, *s.* 6.

A Joint Committee of Management of a District Lunatic Asylum have no power to make a temporary appointment of a resident medical officer, *e.g.*, for twelve months only.

Mandamus lies against a Joint Committee for the appointment of a duly qualified resident medical officer after the lapse of a reasonable time after a vacancy in the office has occurred.

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and BOYD, J.

APPLICATION by the prosecutor, Edward Maziere Courtenay, Inspector of Lunatic Asylums in Ireland, to make absolute a conditional order for a mandamus, dated 17th June, 1908, directed to the Joint Committee of Management of the Carlow District Lunatic Asylum, whereby it was ordered that a writ of mandamus should issue to the Joint Committee "commanding them that they do according to their duty and authority in the premises, pursuant to the Local Government (Ireland) Act, 1898, section 84 (2), appoint a fit, proper, and duly qualified person to fill the office of Resident Medical Superintendent of the Carlow District Lunatic Asylum."

The conditional order had been obtained on the affidavit of Edward Maziere Courtenay, Inspector of Lunatic Asylums; and an affidavit of Dr. Edward J. M'Kenna was filed as cause on behalf of the Joint Committee.

The facts stated in these affidavits (which were practically undisputed) were as follows:—

A vacancy having occurred in the office of Resident Medical Superintendent of the Asylum, in February, 1907, the Joint Committee of Management, at their ordinary meeting on the 13th February, resolved to adjourn the consideration of the matter to a special meeting to be held on the 27th February. At this special meeting a resolution was passed by the Joint Committee proposed by the Most Rev. Dr. Foley, and seconded by Mr. E. Haydon—"That Dr. M'Kenna be appointed Acting Medical Superintendent pending the permanent appointment, notice of salary for the new appointment to be given next Board meeting for consideration at April meeting." By sect. 84, sub-sect. 2, of the Local Government (Ireland) Act, 1898, prescribing the qualifications of Resident Medical Superintendent, it is enacted that he shall be a medical practitioner of not less than seven years' standing, and shall have served not less than five years as a medical officer or assistant, in an asylum for the treatment of the insane. Dr. M'Kenna admittedly did not possess this qualification, because he only qualified as registered medical practitioner in May, 1902, and his period of five years' service as assistant medical officer of an asylum for treatment of insane patients would not be reached till 8th July, 1908. He had served for four years and four months as assistant to Dr. Fitzgerald, the late Resident Medical Superinten-

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dent in the Carlow Asylum. After the resolution of the 11th February, 1907, Dr. M'Kenna entered upon the discharge of the duties of Acting Resident Medical Superintendent of the Asylum, and continued in the discharge of them up to the hearing of the present application. Several meetings of the Joint Committee were held, at which the question of salary and allowance of the Resident Medical Superintendent was discussed and settled, and the Committee issued advertisements that they would, at their meeting to be held on the 11th September, 1907, elect a Resident Medical Superintendent, at a salary of £350 per annum, and allowances valued at £150 per annum, and requiring the personal attendance of the candidates at the board room at 12 o'clock noon on the day of election.

On the said 11th September, 1907, Dr. M'Kenna was the only candidate in personal attendance. The following resolution was proposed by Mr. Anderson, seconded by Mr. Governey, and passed unanimously:—"That at a meeting of the Joint Committee of the Carlow District Lunatic Asylum held on the 11th day of September, 1907, for the purpose of appointing a Resident Medical Superintendent, when Dr. M'Kenna's application for the post was the only one properly before the meeting, it was resolved that his appointment of the 27th February last as Acting Resident Medical Superintendent be continued for twelve months." This resolution having been transmitted to the Inspectors of Lunatics, a letter, dated the 7th October, 1907, was by their direction written and sent by their chief clerk, Mr. James Smith, to the Joint Committee, pointing out that Dr. M'Kenna was not qualified to be appointed Resident Medical Superintendent; that it was mandatory on the Committee to appoint such an officer; and that as sufficient time had elapsed since the vacancy in the office arose, it would be the duty of the Inspectors, unless a Resident Medical Superintendent were forthwith appointed, to bring the matter under the notice of the Lord Lieutenant, with the view of having such steps taken as His Excellency might be advised.

To this the secretary of the Committee replied on the 13th November, 1907, stating the high personal qualifications of Dr. M'Kenna (which were in fact fully admitted), and re-

questing that the resolution of the 11th September might be allowed to stand.

As the result of further correspondence, the following resolution, proposed by Mr. Haydon, and seconded by Mr. Hughes, was passed by the Joint Committee at their meeting of the 8th April, 1908:—

"That advertisements be issued for candidates for the office of Resident Medical Superintendent—the appointment to be made at the ordinary meeting in May, the office to be held temporarily for a period of twelve months. The duties and conditions of the appointment to be in accordance with the Privy Council Rules and Local Government Act (Ireland), 1898."

The purport of this resolution having been communicated to the Assistant Under-Secretary, he wrote to the Committee a letter of the 30th April, 1908, of which the following are the material extracts—"I am directed by the Lord Lieutenant to inform you that His Excellency can in no way assent to the proposed limitation of the tenure of the Resident Medical Superintendent. His Excellency is advised that the appointment should be made without any condition or limitation, which would be opposed to both the spirit and requirements of the law, and the Joint Committee at their meeting in May must therefore elect a Resident Medical Superintendent without such condition, otherwise His Excellency regrets that it will be necessary for him to proceed as already stated, and refer the matter to the Attorney-General with a view to the commencement of legal proceedings to compel the Committee to comply with the law."

At the meeting of the Committee on the 13th May, 1908, the following resolution, proposed by Mr. Anderson and seconded by Mr. Governey, was passed, the Most Rev. P. Foley dissenting:—

"That in view of the fact that the letter from Sir J. B. Dougherty forbids the Joint Committee to make an appointment of a duly qualified Resident Medical Superintendent for one year, and that they consider they cannot legally carry out the instructions conveyed in that letter of making a permanent appointment, they feel that the only course they can adopt is to adhere to their original resolution of the 11th September last,

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appointing Dr. M'Kenna to the post of Acting Medical Superintendent for twelve months from that date.

The Solicitor-General (*Redmond Barry, K.C.*), (with him *Serjeant O'Connor, K.C.*, and *Dudley White*), for the prosecutor :—

There is no power to make the appointment for a year. By section 6 of the Lunacy (Ireland) Act, 1867 (30 & 31 Vict. c. 118), the Resident Medical Superintendent of a district lunatic asylum, when appointed, is to hold office during the pleasure of the Lord Lieutenant. By the Local Government (Ireland) Act, 1898, the power to appoint was given to the County Council, acting through their Committee (sections 9 (5), 84 (1*a*)), but the tenure remains the same and the office is still held at the pleasure of the Lord Lieutenant : *The Queen* v. *Blayney* (1) ; *Hill* v. *The Queen* (2) ; *The Queen* v. *Bayly* (3). This being so, the Joint Committee had no power to make an appointment for a definite limit of time (4).

Ronan, K.C., and *W. J. Johnston* (with them *James O'Connor, K.C.*), for the Joint Committee :—

Section 6 of the Lunacy Act of 1867 is impliedly repealed by section 84 of the Local Government Act.

BOYD, J. :—

This case has come before us on an application to make absolute a conditional order, granted by a Court consisting of the Lord Chief Baron and Mr. Justice Johnson, ordering that unless cause shown to the contrary a writ of mandamus should issue, directed to the Joint Committee of Management of Carlow District Lunatic Asylum, commanding them, pursuant to the Local Government (Ireland) Act, 1898, section 84 (2), to appoint a fit, proper, and duly qualified person to fill the office of Resident

(1) [1901] 2 I. R. 93.
(2) 8 Moo. P. C. 138.
(3) [1898] 2 I. R. 335, 350.
(4) The question as to whether mandamus would lie against the Joint Committee was also argued. The arguments on this point were substantially similar to those reported *infra*, pages 284, 285, in the Court of Appeal.

Medical Superintendent of the Carlow District Lunatic Asylum. That is the order we are now asked to make absolute notwithstanding cause.

In my opinion, we should render nugatory the whole of the provisions of section 9 of the Local Government Act, if we did not make the order absolute.

What are the provisions of that section? Sub-section 1 makes it the duty of every County Council to provide and maintain sufficient accommodation for the lunatic poor in the county, in accordance with the Lunatic Asylum Acts; and if they fail to perform such duty, power is given to the Lord Lieutenant to remedy the failure. By sub-section 2 the duties of the Council under the section are to be exercised through a Committee appointed by them. The Lord Lieutenant is given power to fix the number; and one-fourth of the Committee may be persons not members of the Council. Sub-section 3 transfers to the County Council "acting through that Committee" (and in no other way can they act) "the business of the Governors and Directors of the Asylum under the Lunatic Asylum Acts; and the Committee, subject to the general control of the Council as respects finance, may act without their acts being confirmed by the Council." Sub-section 7 provides that in certain cases, of which the present is one, there shall be a Joint Committee of the Councils of two or more counties. Was there ever a more independent body created than such Committee? Yet we are told that the acts of that Committee are to be considered as the acts of the Council, and that therefore this proceeding has been wrongly taken against the Committee, reliance being placed on the provisions of sub-section 9, that proceedings taken by any Joint Committee shall be taken in the names of the Councils jointly, and proceedings taken against any Joint Committee shall be taken against the Councils jointly.

I agree with the argument of Serjeant O'Connor as to the meaning of that sub-section. The word used is "proceedings" not "all proceedings." What could be more absurd than to say that where the interests of the Council and the Committee are conflicting, the Council alone can sue or be sued? It is to be observed that section 81 of the Act provides that where

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Boyd, J.

a mandamus is issued to a County Council, and the Council "fail to comply therewith" (the expression is "fail," not "fail or refuse"), the Court may appoint an officer and confer on him all or any of the powers of the defaulting Council necessary for carrying into effect the mandamus. But where is the defaulting Council here? In the present case the only parties who have dealt with the matter are the Committee, the Council have not interfered. The Committee, without their acts having been confirmed by the County Council, have taken on themselves to dictate who is to be appointed. The law is express on the subject that the Resident Medical Superintendent must be a registered medical practitioner of not less than seven years' standing, and must have served for not less than five years as a Medical Officer, or Assistant Medical Officer, in an Asylum for the treatment of the insane: Local Government Act, 1898, s. 84 (2). It is admitted that Dr. M'Kenna did not fulfil either one or other of these requirements, and was therefore disqualified for the permanent appointment of Medical Resident Superintendent.

What was done, and by whom? The Committee appointed Dr. M'Kenna Acting Resident Medical Superintendent for a limited period. In my opinion the office still remains one to be held during the pleasure of the Lord Lieutenant, and it is absurd to say that the Committee by making an appointment for a fixed period can take away the power of the Lord Lieutenant to dismiss at pleasure.

For these reasons I am satisfied that a mandamus lies against the Joint Committee, though I have arrived at this conclusion not without some doubt, in consequence of the words of sub-section 9 of section 9 of the Local Government Act. I think, however, that that sub-section is inapplicable, and would render the whole legislation nugatory in a case such as the present. I am of opinion that the conditional order should be made absolute, but without costs.

LORD O'BRIEN, L.C.J.:—

I have such a strong opinion on the second point, entirely in favour of the Solicitor-General and Serjeant O'Connor, that

perhaps I am somewhat carried away as regards the first point, which I may call the technical objection. I will not dissent from the view taken by my brother Boyd on the whole case. I think it is a convenient view, though perhaps I am too much influenced as regards the technical point by the strong opinion I have formed that contrivances were adopted to defeat the provisions of the Act of Parliament. I have a great difficulty, however, in the matter—a difficulty I should wish to be solved by the Court of Appeal. The case is one of general importance, and, no matter what the view of a Court of first instance, deserves the consideration of the Court of Appeal. My difficulty is in limiting the generality of the words of sub-section 9 of section 9 of the Local Government Act. Certainly the Solicitor-General and Serjeant O'Connor presented their view of the case with much force. But, after all, what is the present case? Is it not a proceeding taken against the Joint Committee on a matter within section 9—a matter conversant with the management of the asylum.

The words of section 9 are very comprehensive: "Proceedings had or taken by any such Joint Committee shall be had or taken in the names of the said Councils jointly, and proceedings had or taken against any such Joint Committee shall be had or taken against such Councils jointly." Looking through the entire section it would appear to me that the County Councils are to act through the Joint Committee, that is to say, the County Councils are the principals, they are the hand to pay; and the Committee seems to me to be wholly unequipped with means to pay. It certainly seems to me a matter of grave doubt whether the County Councils were not the proper parties against whom the proceedings should have been brought. However, there is a great deal in what my brother Boyd says, and I will not dissent from his very strong opinion.

I am not to be taken as saying one word in derogation of Dr. M'Kenna, and the Solicitor-General was careful not to say a a word in derogation of him.

Order made for the issue of a peremptory mandamus.

J. G. T.

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The Joint Committee appealed (1).

James O'Connor, K.C. (with him *Ronan, K.C.*, and *W. J. Johnston*), for the appellants:—

Apart from the validity of the appointment of Dr. M'Kenna for a limited period, we contend that the order for mandamus, directed as it is to the Joint Committee and not to the County Councils, cannot be supported. The section of the Local Government (Ireland) Act, 1898, dealing with the management of district lunatic asylums is section 9. Sub-section 1 casts upon the County Councils the duty of providing accommodation for the lunatic poor in their respective counties in accordance with the Lunatic Asylum Acts; and the Lord Lieutenant, in case any Council fail to perform such duty, may order that Council to remedy such failure. By sub-section 2 the duties of a Council are to be exercised through a Committee appointed by them, and (sub-section 5) the Council through the said Committee shall "properly manage and maintain every lunatic asylum for their county; and, subject to the provisions of this Act, may appoint and remove the officers of the asylum." Sub-section 7 provides for the case of a district, such as here, comprising two or more counties, in which case the Committee for the asylum shall be a Joint Committee of Councils. Sub-section 9, on which the question here turns, is as follows:—"Proceedings had or taken by any such Joint Committee shall be had or taken in the names of the said Councils jointly, and proceedings had or taken against any such Joint Committee shall be had or taken against such Councils jointly." In *Maguire & Gatchell* v. *Fermanagh and Tyrone County Councils* (2), where an action had been brought against the Councils, it was held that the solicitor for the Joint Committee was the proper person to defend the action in the names of the Councils. That was an action for work done under a contract with the Commissioners of General Control. By section 84, the County Councils, acting through the Committee, are to appoint

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

(2) 36 Ir. L. T. R. 28.

the Resident Medical Superintendent. Under the Lunacy (Ireland) Act, 1867 (30 & 31 Vict. c. 118, section 6), the Resident Medical Superintendent is to hold office during the pleasure of the Lord Lieutenant. That section has been repealed by the Local Government Act.

Ronan, K.C. :—

The widest term known to the law in describing legal action, civil or criminal, is "proceeding." Corporate bodies often have numerous committees, but these are not incorporated. If duties are cast upon individuals constituting a committee, they may be proceeded against as individuals for neglect of such duty, but not as an organized body. In the case of a single Council, "there shall be transferred to such Council, acting through that Committee, the business of the governors and directors of the asylum under the Lunatic Asylum Acts." The Committee are simply certain individual members of the Council selected by the Council for this duty. Section 9, sub-section 9, is conclusive that such an order as this must be directed to the Councils jointly who are then to perform it through their Joint Committee. By section 81, where a mandamus is issued to a Council, and the Council fail to comply with it, the Court may appoint an officer to carry the mandamus into effect. An application for a mandamus is a "proceeding." Is this a proceeding against the Joint Committee? If so, section 9, sub-section 9, directs that it shall be taken against the Councils jointly.

The Solicitor-General (*Redmond Barry, K.C.*) and *Dudley White*, for the prosecutor, were not called on.

THE LORD CHANCELLOR:—

We do not think it necessary to hear the Solicitor-General in support of the order for a peremptory mandamus made by the King's Bench Division.

Before the passing of the Local Government Act, the Lord Lieutenant, with the advice of the Privy Council, nominated such persons as he thought proper to be Governors and Directors of District Asylums.

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The 9th section of the Local Government Act provides that it shall be the duty of the Council of every county to provide and maintain sufficient accommodation for the lunatic poor in that county in accordance with the Lunatic Asylum Acts; but the duties under the section are to be exercised through a committee appointed by them; and out of the Committee a number not exceeding one-fourth may be persons not members of the Council. There is then transferred to the Council, acting through the Committee, the business of the Governors and Directors of the Asylum under the Lunatic Asylum Acts, and the Committee may act without their acts being confirmed by the Council.

One of these acts is the appointment and removal of the officers of the Asylum, and the regulation of the expenditure.

Where a district asylum comprises, as is here the case, two counties, there is to be a Joint Committee nominated by each Council, and the Committee for the Asylum is to be a Joint Committee. Thus there is a public duty cast upon the County Councils through the Committee to properly manage and maintain every lunatic asylum, and appoint and remove the officers of the asylum; and the 84th section makes it obligatory on the Council acting through their Joint Committee to appoint for each lunatic asylum a Resident Medical Superintendent, who, under sub-section 2, must be a registered medical practitioner of not less than seven years' standing, and shall have served for not less than five years as a medical officer, or assistant medical officer, in an asylum for the treatment of the insane.

There has been a vacancy in the office of Resident Medical Superintendent, and the Committee who have the power to appoint, without their acts being confirmed by the Councils, have neglected and refused, though required, to appoint a properly qualified person. They insist that they shall only appoint one for a limited period—say twelve months—or logically for a week, if they think fit, so as to keep a permanent appointment open till a person not now legally qualified may by time acquire a qualification under the 84th section. This point was not argued in this Court by the appellants' counsel, and it is obviously incapable of being sustained, having regard to the nature of the office and the provisions of the Act.

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It was, however, seriously pressed that a mandamus would not lie against the Joint Committee, and that it must be addressed to the Councils jointly. This argument is founded upon the 9th sub-section of the 9th section of the Act, which provides that "Proceedings had or taken by any such Joint Committee shall be had or taken in the names of the said Councils jointly, and proceedings had or taken against any such Joint Committee shall be had or taken against such Councils jointly.

On whom is the public duty imposed? It is on the Committee who act under sub-section 3 of section 9, without the necessity of their acts being confirmed by the Councils. The contention is that the application must be against the County Councils, but all they could do, it is admitted, is to remove the Committee and appoint another, who might repeat the illegality, and thus there would be a duty imposed without any remedy for its non-performance; and all the time the asylum would be left without a properly qualified superintendent. The duty and the enforcement must be found in the same body. If not, the 9th section ceases to be operative. Suppose one section of the Joint Council took one view and another section a different one, there would be chaos, and the illegality would remain unredressed.

The whole force of the appellants' contention was directed to sub-section 9, which provides that "proceedings had or taken against a Joint Committee shall be had or taken against such Councils jointly."

It might be enough to say that the clause is pointed to the case of a Joint Committee as distinguished from a single one, and the clause does not apply, and was passed *alio intuitu* altogether. But if the result of the argument is that this sub-clause renders necessary a mandamus against the Joint Councils for breach of a duty imposed on the Committee, then sub-clause 9 would become inoperative, because no remedy would exist. Counsel, though asked, were unable to tell what the form of return would be by the Councils as such. A return that they were taking steps to remove the Committee would be obviously no performance of the public duty imposed.

I think the appeal must be dismissed with costs.

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FITZGIBBON, L. J. :—

On the question whether what was done by the Committee, in making a temporary appointment, was right or wrong, the Lord Chief Justice had an opinion so strong in favour of the prosecutor, that he thought he might be "somewhat carried away by it" as regards the other question—that of the liability of the Committee to be sued. Counsel in this Court did not contend that the temporary appointment was valid, and the only question now before us is whether the statutory Committee are a body sufficiently organized, or in law recognizable, to have the performance of their public duty enforced upon them, when they have refused to perform it. The appointment of the officers of an asylum is a public duty, and it must be done "through the Committee": in my opinion, the writ of mandamus was properly directed against those who refused to do the duty which they alone could do. The construction of the Local Government Act, 1898, section 9 (9), which would make it necessary to proceed by mandamus against the County Councils only, would make it impossible to enforce the making of the appointment. It would be strange if the mandamus should issue against County Councils, who could neither jointly nor severally elect a medical officer, nor make the Committee do so. The Councils have no duty, and can do no act, in the matter, except that of appointing members of the Committee.

In the *Fermanagh Case* (1) the Court held that, in proper cases, two Councils may appear separately. Could one Council, served with a mandamus in this case, return that they, and all the members of the Committee whom they had appointed, were anxious to obey the law, while the other Council made some different return? I hold that the mandamus sought in this case is not within section 9 (9), because it is a proceeding which, from its very nature, cannot be taken against the Councils jointly, and it must be taken, if at all, against the Joint Committee. It is also to be noted that the means of enforcing the law can not be different where the district comprises two or more Counties, from what it is where the whole district is in one County.

(1) 36 Ir. L. T. R. 28.

HOLMES, L.J. :—

I concur. This appeal is important, inasmuch as if we were to decide in favour of the appellants on the only question argued on their behalf, the Irish Lunatic Asylums might be left without officers; and there would be no remedy for such a state of things. By the 9th section of the Local Government (Ireland) Act, 1898, the duty of appointing the Resident Medical Superintendent, as well as other officers, of a Lunatic Asylum is entrusted to a committee appointed by one or more County Councils, but the members of which need not all be members of the Council or Councils.

Once such Committee is appointed, the management of the Asylum is entrusted to it, and the County Council can neither manage for itself, nor interfere in the management. The appointment of the Committee, if the County Council neglected this duty, might be enforced by writ of mandamus; but that being its only duty, no such writ would lie against it for non-performance of a duty which could only be performed by the Committee. It is impossible to suggest any form of writ against the County Council that would not be nugatory. Therefore, in this case the Committee having declined to appoint a Resident Medical Superintendent, except upon terms that would make the appointment illegal, a writ of mandamus has been applied for upon the ground that the Committee, being a public body, having a public duty to perform, has declined to perform it.

The argument for the appellants is rested on the final clause of section 9, which, in my opinion, does not touch the matter in controversy.

Although the County Council cannot interfere with the Committee, the section shows that what is done by the Committee in the management is done as agent of the Council, and any right or liability arising therefrom is a right which the Council is the proper body to enforce, and a liability for which the Council is responsible. Therefore no provision was required to provide for what was a manifest consequence of the section. But, as the Committee might be appointed by two or more County Councils, the last sub-section was inserted to point out the mode in which

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they were to sue and be sued. This, however, is wholly irrelevant to a case where the Committee has refused to perform a duty imposed upon it alone, and, therefore, where no right or liability could have accrued to or against the Council.

Solicitor for the prosecutor: *Malachy Kelly.*

Solicitor for the Joint Committee: *William M. Byrne.*

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KELLY AND ANOTHER *v.* BEGGAN (1).

County Court—Decree—Renewal—Affidavit made out of Court—Statute—Implied repeal—"Generalia specialibus non derogant"—14 *&* 15 *Vict. c.* 57, *ss.* 140, 141, 142—27 *&* 28 *Vict. c.* 99, *s.* 45—40 *&* 41 *Vict. c.* 56, *s.* 70.

A renewal of a civil-bill decree may be granted on an affidavit made out of Court. The provisions of sections 140 and 141 of 14 & 15 Vict. c. 57, requiring such affidavit to be made before the County Court Judge in open Court, are impliedly repealed by 27 & 28 Vict. c. 99, s. 45, and 40 & 41 Vict. c. 56, s. 70.

CASE STATED by Gibson, J., on the hearing of a civil-bill appeal at Fermanagh Summer Assizes, 1908. The case set out as follows:—

"1. This was an appeal from a dismiss without prejudice of the plaintiffs' application for the renewal of a decree, dated the 17th October, 1905, grounded on an affidavit of one of the plaintiffs, sworn before a Justice of the County Louth. The application was brought under 14 & 15 Vict. c. 57, sect. 142, which requires notice in the prescribed form to be served, and directs the application to be heard and determined in like manner as any ordinary civil-bill. The statutory form of notice requires the party summoned to attend in person. The defendant did not appear in the County Court or on the appeal. The notice was duly served.

(1) Before PALLES, C.B., and ANDREWS, JOHNSON, and BOYD, JJ.

"2. His Honour dismissed the application in order to bring before the Court certain material sections and considerations which had not been apparently brought to the attention of Andrews, J., and Holmes, L.J., who decided in *Walsh's Case* (1) and *Weir's Case* (2) that an affidavit sworn out of Court was sufficient. These cases were decided under section 140, which does not require any notice. The Judge prepared and submitted a note handed to me by the Clerk of the Peace, calling attention to sects. 126 and 141, the latter apparently not referred to on the hearing of *Walsh's Case* (1) and *Weir's Case* (2), and giving his reasons for holding that there was no jurisdiction to grant a renewal. These reasons were substantially as follows:—(*a*) 27 & 28 Vict. c. 99, s. 45, and 40 & 41 Vict. c. 56, s. 70, are only amendments of sect. 126 of the Civil Bill Act, which admittedly does not apply to renewal applications under sections 140 and 141 of that Act; (*b*) section 140 makes an affidavit sworn in open Court an integral and necessary part of the public judicial procedure, and a condition of jurisdiction. The general language of the subsequent statutes as to affidavits does not alter this special and particular condition; an affidavit sworn out of Court cannot be fitted into the conditional jurisdiction created by sect. 140; (*c*) the limited express repeal effected by the Statute Law Revision Act of 1892, the County Court Rules, and the practice ever since, show that sect. 141 was not repealed as far as regards the affidavit thereby prescribed, which is a part of the judicial hearing and procedure. To these reasons may be added one which has occurred to me in reference to sect. 142, under which the present application is brought. If the notice requires the defendant to attend in person, does not that assume the personal presence of the applicant to meet him, and if necessary to be ready for cross-examination? The language of the proviso as to the manner of hearing rather suggests oral evidence in presence of the parties. I need not summarize the argument of Mr. Kennedy, plaintiffs' counsel, as he will bring it himself before the Court. It is because the defendant will not appear that I have indicated the argument on his behalf. Maxwell on Statutes contains a full discussion of the principle of implied repeal. I may refer to

(1) 41 Ir. L. T. R. 180. (2) 42 Ir. L. T. R. 158.

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Reeve v. *Gibson* (1); *Re Smith's Estate* (2); and *Seward* v. *The Vera Cruz* (3).

"3. As the question raised was one of jurisdiction depending on the application of implied repeal by what was said to be inconsistent affirmative legislation, a type of case often exciting marked conflict of judicial opinion, and as the matter appeared to be one of considerable difficulty, and one where an authoritative decision binding Circuit Judges would be desirable, I offered to state a case on the terms that plaintiffs should abide their own costs in respect of such case in any event. This was agreed to, and I state the case accordingly. Had the argument stood as it was before Andrews, J., and Holmes, L.J., without reference to the new sections and considerations noticed by the Judge below, I should not have dissented from their conclusion.

"4. The decree, notice of application, affidavit, dismiss, and note of Judge Craig are incorporated herewith.

"The questions for the decision of the Court are:—

(1) Can a renewal be granted on an affidavit made out of Court?

(2) Was there jurisdiction to grant the renewal applied for under section 142 of the Civil Bill Act on the affidavit made?

(3) Should the dismiss be reversed?"

Henry Kennedy, for the plaintiffs:—

The provisions of sections 140 and 141 of 14 & 15 Vict. c. 57, requiring the affidavit for the renewal of a civil-bill decree to be made before the County Court Judge in open Court, are impliedly repealed by section 45 of 27 & 28 Vict. c. 99, and section 70 of 40 & 41 Vict. c. 56. The former section enacts that all affidavits to be used in any Civil-bill Court in Ireland may be sworn before the Chairman of the County out of Quarter Sessions, and anywhere in Ireland, or before the persons mentioned therein. The latter section enacts that any affidavit to be used in a Civil-bill Court may be sworn before a commissioner for taking affidavits in any

(1) [1891] 1 Q. B. 652. (2) 35 Ch. D. 589. (3) 10 App. Cas. 59.

Superior Court, or before any Clerk of the Peace, or any Justice of the Peace. These provisions, being inconsistent with and repugnant to the above-mentioned provisions in sections 140 and 141 of 14 & 15 Vict. c. 57, must be taken to have repealed them: Maxwell on Statutes (4th ed.), pp. 233, 246, 247. The cases referred to by Gibson, J., turning on the maxim "*generalia specialibus non derogant*," have no application where the several statutes form a code, as in the present case. The proviso at the end of section 140 of 14 & 15 Vict. c. 57, enabling the affidavit to be made by the known agent or receiver of a party, has been repealed by the Statute Law Revision Act, 1892. The reason for such repeal was that, as the class of persons before whom the affidavit might be sworn had been enlarged, the class of deponents might well be restricted. In the case of a party resident at a distance, great inconvenience would result from holding that the affidavit must be made in open Court. Take the case of a plaintiff residing in England: as the affidavit can no longer be made by his agent, it would be necessary that he should come over in person to the Civil-bill Court. [He referred to *Walsh* v. *Short* (1) and *Weir* v. *M'Cormack* (2)].

There was no appearance for the defendant.

Cur. adv. vult.

Dec. 15.

PALLES, C.B.:—

The question reserved for us by Mr. Justice Gibson is, whether a renewal of a civil-bill decree can be granted on an affidavit made out of Court.

This question has, within the last three years, been decided on two different occasions by Judges of the Supreme Court, on circuit, viz., by Mr. Justice Andrews, in *Walsh* v. *Short* (1), and by Lord Justice Holmes, in *Weir* v. *M'Cormack* (2). The learned County Court Judge of Fermanagh has had a difficulty in following these decisions; and in his judgment, of which a note has been furnished to us, he states that in neither of those cases was there any appearance for the defendant, and that the arguments

(1) 41 Ir. L. T. R. 180. (2) 42 Ir. L. T. R. 158.

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capable of being raised on his side were not fully presented to the learned Judges, and in particular that it does not appear from the printed reports of the decisions that the 126th and 141st sections of the Act (14 & 15 Vict. c. 57) were mentioned on either occasion; and after calling attention to the fact that he has not the power of Magistrates at Petty Sessions to state a case for the King's Bench Division, and thus avoid making a decision which appeared to be in conflict with those of the Judges at the Assizes, and considering that the question required further consideration, the learned County Court Judge dismissed the application for renewal. An appeal was taken from this decision to the last Fermanagh Assizes. Mr. Justice Gibson, who heard the appeal, was of opinion that, as the question raised was one of jurisdiction, and depended on the application of the doctrine of implied repeal, by what was said to be inconsistent affirmative legislation (a tpye of case which he observed often created a marked conflict of judicial opinion); and, as the matter appeared to him to be one of considerable difficulty, stated the present case in order to obtain the decision of a Divisional Court.

The question thus stated depends upon the effect, by way of repeal, on sections 140 and 141 of the Act 14 & 15 Vict. c. 57 of two subsequent enactments, viz., section 45 of the Civil Bill Courts Procedure Amendment Act (Ireland), 1864 (1), and section 70 of the County Officers and Courts (Ireland) Act, 1877 (2). Section 140 of the Act of 14 & 15 Vict. c. 57, enacts that "No decree shall be at any time renewed until the plaintiff . . . shall have made affidavit before the said Assistant Barrister . . . *in open Court*, which affidavit shall state . . . the sum remaining due . . . on foot of the said decree, after all just allowances." Section 141 enacts that "The affidavit so sworn . . . shall be written or printed on the same piece of paper with the renewal of the . . . decree, filled and prepared for the said Assistant-Barrister to sign; and when such affidavit . . . shall have been sworn, the said Assistant-Barrister shall *sign his name thereto*, testifying that the same was *sworn before him in open Court*; and the said Assistant-Barrister shall, and may, then renew such decree . . .

(1) 27 & 28 Vict. c. 99. (2) 40 & 41 Vict. c. 56.

(by signing such renewal), for such sum as shall be sworn to remain due . . . together with the costs of such renewal; and thereupon the said affidavit shall be separated from the said renewal and shall be delivered to the Clerk of the Peace for the county, or his deputy, and shall be kept among the records of the county."

A previous section of the same Act (section 126) empowered the Assistant-Barrister, although he should not be at the time within his county, to take "any such affidavit or affidavits as he is now by law entitled to take, or as in any way relates to any action or proceeding in his Court of civil-bill jurisdiction," provided that every affidavit shall within six days be delivered to the Clerk of the Peace to be filed amongst the records of such Court. And the enactment proceeds:—"And every such affidavit shall be of the same force and effect, and the penalty for any false swearing therein shall be the same, to all intents and purposes, as if such affidavit was taken by or before such Assistant-Barrister in the Civil-bill Court within his county."

It seems clear that, to prevent inconsistency between section 126 and sections 140 and 141, the affidavit required by the latter sections, which is to be made "in open Court," must be treated as an exception out of the general words of section 126. Thus there was, at the time of the passing of the Act of 1864, a distinction as to the place at which affidavits could be sworn. An affidavit to obtain a renewal should be sworn "in open Court"; an affidavit for any other purpose might be sworn elsewhere, and if filed within the specified time had the same effect as if sworn in open Court.

The preamble to the Act of 1864 (1) is: "That it is expedient to amend the procedure in the Civil-bill Courts"; and it enacts in section 45, "*All* affidavits to be used in any Civil-bill Court in Ireland may be sworn before the Chairman of the County out of Quarter Sessions, and anywhere in Ireland, or before any Master Extraordinary in Chancery in England or Ireland, or any Commissioner for taking affidavits in any of the Superior Courts at Westminster or Dublin"; provided that they "shall have been filed as of record in the Court where the same are

(1) 27 & 28 Vict. c. 99.

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intended to be used before the same shall be read." The question is, whether the expression, "*all* affidavits," with which this section commences, includes affidavits for obtaining renewals of decrees.

Now, at the time of the passing of this Act, all affidavits to be used in the Civil-bill Courts might, under section 126 of the former Act, be sworn before the Chairman of the County out of Quarter Sessions, and anywhere in Ireland. To give any effect, therefore, to this section, so far as it relates to the power of the Chairman, "all affidavits" must include an affidavit for the purpose of renewal. Were it otherwise, the words in the statute referring to the Chairman would have no operation—the very last construction to which a Court is at liberty to resort. If the expression "all affidavits" be read in this sense in reference to the powers of the Chairman, so also must it be read in reference to those of the Masters Extraordinary in Chancery, and of the Commissioners for taking affidavits. It follows that the section, although couched in affirmative language, repeals the provisions of section 140 of the Act of 1851 (1), so far as they require that the affidavit should be sworn before the Assistant-Barrister in open Court, and that he should sign his name thereto, testifying that it was so sworn.

The second enactment relied on is section 70 of the Act of 1877, which is in these words—"*Any* affidavit to be used in a Civil-bill Court may be sworn before a Commissioner for taking affidavits in any Superior Court, or before any Clerk of the Peace, or any Justice of the Peace, and shall, before being used, be lodged with the Clerk of the Peace for the county in which such Civil-bill Court shall be held." It was under this section that the affidavit in the present case has been sworn, viz. before a Justice of the county of Louth.

Save by extending the class of persons empowered to take affidavits, this section does not appear to me to be relevant. Any affidavit within section 45 of the Act of 1864 must also be within section 70 of the Act of 1877. If section 45 of the Act of 1864 includes, as I hold it does, an affidavit for the renewal of a decree,

(1) 14 & 15 Vict. c. 57.

so must such an affidavit be within section 70 of the Act of 1877; and as the affidavit in question here is within the last-mentioned section, having been sworn before a Justice of the Peace (although one of a different county), it was sufficient to confer jurisdiction to renew.

The consideration which seems to have pressed Mr. Justice Gibson, and which probably was the foundation of the difficulty of the learned County Court Judge, was the well-known maxim, "*generalia specialibus non derogant.*" I am unwilling, therefore, to part with the case without saying something as to this maxim. One of the most authoritative of the modern decisions as to its application, viz. *Garnett* v. *Bradley* (1), shows that it does not apply here. The question there was whether a provision in the statute of 21 James 1, c. 16, which disentitled a plaintiff in slander to his costs where the verdict was less than forty shillings, was repealed by Order LV, made under the authority of the English Judicature Act of 1875 (38 & 39 Vict. c. 77), which provided that the costs in all proceedings in the High Court should be in the discretion of the Court. *Parsons* v. *Tinling* (2) had decided that the provision was repealed, by reason of the inconsistency of the Order with the previous statute; and this decision was followed by the Exchequer Division in *Garnett* v. *Bradley* (1). The judgment of the majority of the Court of Appeal (Bramwell, L.J., and Brett, L.J.), reversing that of the Divisional Court, was grounded solely upon the application of this maxim. "No doubt," says the judgment, "that Order in terms includes all costs in all cases, and leaves them to the discretion of the Court, while 21 Jac. 1, c. 16, sect. 6, says the plaintiff recovering less than 40*s.* in an action of slander shall recover no more costs than damages; and it is a rule that posterior laws repeal prior laws to the contrary. But that rule is subject to a qualification excellently, as it seems to me, expressed by Sir P. B. Maxwell in his book on the interpretation of statutes. He says, page 157, under the heading '*generalia specialibus non derogant*': 'It is but a particular application of the general presumption against an intention to alter the law beyond

(1) 2 Ex. D. 349; 3 App. Cas. 944. (2) 2 C. P. D. 119.

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the immediate scope of the statute to say that a general Act is to be construed as not repealing a particular one by mere implication. A general later law does not abrogate an earlier special one. It is presumed to have only general cases in view, and not particular cases which have been already provided for by a special or local Act, or, what is the same thing, by custom. Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless it manifests that intention in explicit language.'"

From that decision there was an appeal to the House of Lords, the decision in which largely turned upon the application of the maxim in question. As to it, Lord Hatherley says (1) :—" When an Act of Parliament repeals a preceding Act which relates to a certain definite subject-matter distinctly laid down for the guidance of those who are to be operated upon by the Act of Parliament in that special matter, or to a particular class of persons who are to be either protected, or it may be, affected adversely, by a particular clause of the enactment, then the Legislature is presumed to have had that very special subject-matter, and that very special class of persons, in contemplation when the subsequent statute was passed; and if there was a general Act subsequently passed, the generality of which was large enough, as far as words go, to comprehend the particular matter dealt with in the previous enactment, it will be considered whether or not, as regards the persons who are to be affected or protected by the Act, persons who are not in any way mentioned or specified by the subsequent general Act are to be injuriously affected by an adverse enactment, or deprived of a benefit they are entitled to under a previous enactment. And in that case the Court, in construing the subsequent general Act of Parliament, would expect to find something or other pointing out that the attention of the Legislature had been turned towards the former special enactment, and, in passing the general Act, that it had made the new enactment with the view of embracing every case (including that special case) embraced within the provisions of the previous Act."

(1) 3 App. Cas. 952.

He then proceeds to point out what the special Act of James 1 did :—"That Act can hardly be said to have contemplated a special class of persons; it only says that anybody bringing an action of slander who does not recover more damages than 40*s.* shall not recover more costs than damages. It can hardly be said that persons disposed to bring actions for damages for slander, can be held to be a class of persons who are to be struck at on the one hand, or on the other hand to be regarded, and who must be held as not to be within the generality of another Act which would embrace all classes of persons whatsoever. It is simply a general Act striking generally at all persons who bring this class of action, but they do not form any particular class of the community who are entitled to any special observance, care, or regard in the framing of a subsequent Act."

Later on he adds (page 954) :—"The argument with reference to the withdrawal of any object of a special Act, passed anterior to the general Act, from its operation, entirely fails, when you come to see that it was not a particular class of Her Majesty's subjects who were exempted from the operation of a particular rule, but that a mode was pointed out of administering justice in certain cases."

Lord Blackburn, referring to the same rule, says (page 967) :—"During the argument I was rather impressed with the belief that that ground was sound, and that it was properly applied; but I think on consideration, and after looking into the cases which have been referred to, that, though that doctrine itself was sound, yet it was misapplied to this case; and I will proceed to state why."

Then, after referring to a number of cases, including the well-known ones of *Hawkins* v. *Gathercole* (1) and *Fitzgerald* v. *Champneys* (2), which to that time were considered the leading authorities upon this rule, he proceeds (page 968) :—"In all these cases, however, the particular statute relied upon was a statute in favour of a particular class of persons, or the property of a particular class of persons. I do not take upon myself to say that all cases in which that rule has been applied have been such, although I am not aware of any case in which it has been applied

(1) 6 De G. M. & G. 1. (2) 2 J. & H. 30.

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to which that remark would not be applicable. But where that is the case, where the particular enactment *is particular in the sense that it protects the rights, the property, the privileges of particular persons or a class of persons*, the reason for the rule which has been acted upon is exceedingly plain and strong. It would be very unjust, or I would rather say unfair (I do not go farther than that), to pass an enactment, taking away from a particular person or class of persons his or their rights, without hearing what he or they have got to say about it; and if general words were to have the effect of taking away the rights of a particular person or class which had been given to them beforehand, it would be done without their having any knowledge or opportunity of resisting it, and it is not to be imputed to the Legislature or to be supposed that the Legislature would do what was unfair. Therefore, I think that where only general words are used there is a strong presumption that the Legislature did not intend to take away a particular privilege, right, or property, of a particular class, unless they have done something to show that. . . I think, my Lords, that that principle will reconcile almost all the cases; certainly it will reconcile all I have cited, and it is a good and intelligible principle. But when you come to apply it to the present case, I do not think it applies at all. The statute of James and the other two statutes I have mentioned were not passed in favour of a particular class of persons at all. Everyone of Her Majesty's subjects is just as much likely to be sued by a roguish attorney and to be interested in the question of costs as another; and when the statute of James said, We will discourage actions of slander by saying that a plaintiff who recovers less than 40*s*., shall have no more costs than damages; the Legislature was not giving a privilege to a particular class, it was passing a general enactment for the benefit of all His Majesty's liege subjects."

Every word of the passages I have read from those opinions of Lord Hatherley and Lord Blackburn applies to the present case. The provisions of the 140th and 141st sections of the Act of 1851 were not passed in favour of any particular class of persons. Every one of Her Majesty's subjects might be a successful plaintiff or a successful defendant in a civil-bill proceeding. The Legislature, by these sections, did not give a

privilege to a particular class. It passed a general enactment for the benefit of all Her Majesty's liege subjects, to secure that accuracy should be observed in the renewal of civil-bill decrees and dismisses. It was part of a general code of procedure in the Civil-bill Courts, and was a course of procedure the strictness of which it is plain, from the subsequent Acts of 1864 and 1877, the Legislature deemed to be unnecessarily inconvenient, and, for that reason, relaxed.

The rule relied on has, therefore, in my opinion, no application to the question here; and we have no more to do than to determine whether there is inconsistency between the prior and the subsequent Acts. For the reasons I have already stated I hold that the provision authorizing "all affidavits," or "any affidavit," to be taken outside Court, is inconsistent with the provision that an affidavit for a particular purpose must be taken in open Court. Consequently, all the questions put by Mr. Justice Gibson ought to be answered in the affirmative.

ANDREWS, JOHNSON, and BOYD, JJ., concurred.

Solicitor for the plaintiffs: *Henry Murphy.*

J. G. T.

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THE KING (REDDING) *v.* E. G. SWIFTE, one of the Divisional Justices of the Police District of Dublin Metropolis (1).

Justices—Dublin Divisional Justice—Jurisdiction to issue summons for service outside Dublin Police district—5 & 6 Vict. c. 24, s. 49—"Stipendiary Magistrate"—Married Women (Maintenance in case of Desertion) Act, 1886 (49 & 50 Vict. c. 52).

A Divisional Justice of the Dublin Metropolitan Police district has jurisdiction, in respect of any matter summarily determinable by him, and arising within such district, whether of a civil or criminal nature, to issue a summons for service on a defendant anywhere in Ireland.

Great Southern & Western Railway Co. v. *Leyden* ([1907] 2 I. R. 160) distinguished.

The expression "Stipendiary Magistrate" in sect. 1 of the Married Women (Maintenance in case of Desertion) Act, 1886, includes a Divisional Justice of the Dublin Metropolitan Police district.

Proceedings under the last-mentioned Act are of a civil nature.

Quære: Does the decision in *Great Southern & Western Railway Co.* v. *Leyden* ([1907] 2 I. R. 160) apply to proceedings under that Act in Petty Sessions districts outside the Metropolitan Police district.

Certiorari.

A summons was issued by Mr. Swifte, one of the Divisional Justices of the Dublin Metropolitan Police District, requiring the prosecutor herein, Thomas Benson Redding, who resided at Newtownards, in the county of Down, to appear before one or more of the Justices in the said district, presiding at the Dublin Metropolitan Police Court, to answer the complaint of Hannah Redding, who resided within the Metropolitan District, for that the prosecutor, being the husband of the complainant in the summons, and being able wholly or in part to maintain her, did wilfully refuse and neglect so to do, and had deserted her; and requiring him to show cause why he should not be ordered to pay to the com-

(1) Before Lord O'Brien, L.C.J., and Madden, Wright, and Dodd, JJ.

plainant for her support such weekly sum, not exceeding £2, as might be in accordance with his means, and any means the complainant might have. This summons was served personally on the prosecutor at Newtownards.

The summons was heard before Mr. Swifte at the Southern Division Metropolitan Police Court, on the 31st July, 1908. The prosecutor did not appear. Evidence was given of the service of the summons; of the marriage of the parties; and that the prosecutor had deserted his wife at the Four Courts Hotel, Inns Quay, in Dublin. Evidence was also given as to the means of the prosecutor. The magistrate made an order that the prosecutor should pay to his wife the sum of 30*s.* per week.

The prosecutor obtained a conditional order for a writ of *certiorari* to quash this order on the grounds—(1) "That the said magistrate being a Dublin Metropolitan Police Magistrate, and not a magistrate for the county of Down, which county is not a county adjoining the county of Dublin, did issue a summons for service in the said county of Down requiring the attendance of defendant before said magistrate in the city of Dublin, and that in so doing the said magistrate acted in excess of jurisdiction." (2) "That the said magistrate made the said order of the 31st July, 1908, in the absence of the said defendant, he not having submitted to the jurisdiction of the said magistrate."

Cause having been shown on behalf of the Crown against making the conditional order absolute, the present application was on behalf of the prosecutor to make the conditional order absolute, notwithstanding cause shown.

Ronan, K.C. (with him *Vincent Rice*), for the prosecutor:—

We contend—first, no jurisdiction is given to a Dublin Divisional Police Magistrate by the Act under which the present proceedings were instituted, viz., the Married Women (Maintenance in case of Desertion) Act, 1886. The power to issue a summons or make an order under that Act is given to two Justices in Petty Sessions, or a Stipendiary Magistrate. A Dublin Divisional Magistrate is not a Stipendiary Magistrate. Mr. Molloy in his note on section 16 of the Criminal Justices Act (18 & 19 Vict. c. 126), referring to the expression 'Stipendiary Magistrate,' says:

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"This does not mean every Stipendiary or Resident Magistrate such as we have in Ireland, but a particular class of Stipendiary Magistrates appointed for some city or town, &c., and sitting at a Police Court, or other place appointed in that behalf. There does not appear to be any Stipendiary Magistrate of that class in Ireland" (Molloy's Justice of the Peace, p. 52); see also p. 835, note (*d*). When the Legislature intends that the expression "Stipendiary Magistrate" shall include a Dublin Divisional Magistrate, it so enacts in express terms. Thus, in the Merchant Shipping Act, 1876, it is enacted (sect. 42), that "Stipendiary Magistrates" shall be deemed to include any of the Justices of the Peace in Dublin Metropolis." The words "shall be deemed to include" show that the term "Stipendiary Magistrate" would not of its own force include such Justices. In Nun and Walsh, Justices of the Peace (2nd ed.), p. 2, a distinction is drawn between the Metropolitan Police Magistrates and Stipendiary Magistrates.

Secondly, a Dublin Divisional Magistrate has no jurisdiction in any case to issue a summons for service outside the Dublin Metropolitan Police district. There is no power to issue a summons for service outside the territorial limits of the jurisdiction of the Justice issuing it: *Great Southern and Western Railway Co.* v. *Leyden* (1). It is said in Nun and Walsh, Justices of the Peace, p. 164, that some few statutes authorize the service of the summons beyond the jurisdiction of the Justice granting it—a statement, as Lord O'Brien, L.C.J., says in *Leyden's Case* (1), p. 162, which plainly implies that there was, in the opinion of the profession, no power to serve a summons generally throughout Ireland; and the Lord Chief Justice accepts this as a correct statement of the practice. One of the statutes referred to in Nun and Walsh is the Municipal Corporations Act (3 & 4 Vict. c. 108), by section 161 of which it was enacted that both summonses and warrants issued by a borough Justice might be served and executed within any county in which the borough was situated, or within seven miles of such borough. By the Dublin Police Act, 1842 (5 & 6 Vict. c. 24), passed two years after the last-mentioned Act, it is provided by section 48 that a *warrant* issued by a Dublin Divisional Justice

(1) [1907] 2 I. R. 160.

may be served or executed out of the Dublin metropolitan police district (a provision having no application to the present case, which is of a civil and not criminal nature); while section 49, which deals with *summonses*, gives no power to serve out of the district. The argument *ab inconvenienti* cannot be relied on by the Crown. By section 2 of the Act of 1886 a summons under the Act may be granted and served as in cases of assault. Redding could, therefore, have been prosecuted before the Justices at Newtownards: Petty Sessions (Ireland) Act, 1851, sect. 10. It may be contended that section 1, sub-section 1, of the Act of 1886, which enacts that payment of the sum ordered may be enforced against the husband in the same manner as payment of money is enforced under an order of affiliation, refers to 35 & 36 Vict. c. 65, and by incorporating the provisions of that Act gives the magistrate jurisdiction irrespective of the residence of the defendant. But that Act never applied to Ireland. In any event, section 1, sub-section 1, of the Act of 1886 applies only to the enforcement of the order, and not to the making of it.

Redmond Barry, K.C. (*Solicitor-General*), and *Dudley White*, for the Crown:—

As to the first point: A Dublin Divisional Justice represents in the Dublin metropolitan police district the authority of Petty Sessions in other parts of Ireland. By the Dublin Police Act, 1859 (22 & 23 Vict. c. 52), sect. 11, such Divisional Justice may do alone at the Dublin Police Courts any act which by any law then in force, or any law thereafter to be made not containing a provision to the contrary, is to be done by more than one Justice. At all events the expression "Stipendiary Magistrate" is wide enough to include a Dublin Divisional Justice. He is a magistrate receiving a stipend. It could never have been intended that the Act of 1886 should not apply to the Dublin police district.

As to the second point: Even apart from any special jurisdiction which may be conferred by the Married Women (Maintenance in cases of Desertion) Act, 1886, we contend that a summons issued by a Dublin Divisional Magistrate in respect of any matter summarily determinable by him, and arising within the Dublin

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metropolitan police district, may be served in any part of Ireland. By section 48 of 5 & 6 Vict. c. 24, the warrants therein mentioned, including a warrant to compel the appearance of any person, or warrant for the apprehension of any person charged with any offence, may be *served* or executed out of the district. The word "served" can only apply to the warrant to compel appearance, and shows that that expression must include a summons, since the word "served" would not be applicable to a warrant under which a person was arrested, "executed" being the word in such case. A summons is not a mere notice. It is a judicial process to compel appearance: *Leyden's Case* (1). The Divisional Justice has jurisdiction, "without issuing any summons," to issue a warrant for the apprehension of any person charged with any offence cognizable before him (5 & 6 Vict. c. 24, sect. 51), and such warrant may admittedly be executed although the defendant is outside the Dublin police district. It could not have been intended to give the magistrate power to issue a warrant in such case, but to preclude him from adopting the more lenient course of issuing a summons. Section 70 gives jurisdiction to hear and determine offences committed within the police district, without any restriction as to the residence of the defendant. This must give jurisdiction to issue a summons in all such cases. Clearly, therefore, in cases of a criminal nature a summons may be issued for service out of the jurisdiction, and if sect. 2 of the Act of 1886 is to be taken as dealing with jurisdiction, and not merely procedure, there was power to serve the summons in the present case out of the district, since by that section it may be granted and served in the same manner as summonses for assault. Assuming, however, as we think to be the true construction, that the section deals with procedure only, we contend that nevertheless there was jurisdiction to issue the summons for service out of the district. We submit that a Dublin Divisional Magistrate has such jurisdiction in civil as well as criminal matters. Section 49 of 5 & 6 Vict. c. 24, which is the only section giving power to issue a summons, applies to both civil and criminal cases. The provisions of that section are substantially identical with the pro-

(1) [1907] 2 I. R. at p. 164.

visions in sect. 1 of Jervis's Act (11 & 12 Vict. c. 43), under which, admittedly, there is jurisdiction to serve the summons anywhere in England: *Berkley* v. *Thompson* (1); Stone's Justices' Manual (40th ed.), p. 37, note (*p*). *Leyden's Case* (2) is distinguishable. It turned upon the construction of the Petty Sessions Act, which does not apply to the Dublin Divisional Magistrates (sect. 41). The judgments in that case are strongly in favour of our contention. The decision is based on section 10 of the Petty Sessions Act, by which jurisdiction is given to the Justices of the county in which the defendant resides, although the offence may have been committed outside that county; and sect. 11, which gives express power to serve a summons in a county adjoining that of the Justices issuing it, this express limited power being deemed inconsistent with a general power to serve throughout Ireland. Palles, C.B., expressly states (p. 172) that but for these provisions the construction of the English and Irish Acts ought to be identical, and that upon that construction there would be jurisdiction to serve the summons in the foreign county. No such provisions as these are to be found in the Dublin Police Act. Reliance was also placed on the fact that under the Petty Sessions Act a warrant had no efficacy outside the county where issued, unless backed as required by section 26, sub-section 2. A warrant of a Dublin Divisional Magistrate, on the other hand, may be served anywhere in Ireland without backing: 5 & 6 Vict. c. 24, sect. 48. Moreover, it has always been the practice of the Dublin Divisional Magistrates to issue summonses for service outside the district (3); the practice under the Petty Sessions Act was the other way: *Leyden's Case* (2), *per* Lord O'Brien, L.C.J. (p. 162). Under 5 & 6 Vict. c. 24 there is clearly power (sect. 52) to serve a summons on a witness out of the jurisdiction. Under the Petty Sessions Act, on the other hand, there is no such power; the jurisdiction is given only where the witness is within the jurisdiction (sect. 13). Unless the summons in the present case can be served on the defendant in Newtownards, the wife would have no remedy. The Justices at Newtownards would have no jurisdic-

(1) 10 App. Cas. 45, at p. 48.
(2) [1907] 2 I. R. 160.
(3) As to the practice in this respect, see the letter of the Chief Magistrate, set out in the judgment of Lord O'Brien, L.C.J., *infra*, p. 313.

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tion to hear the case. The power given to Justices by sect. 10 of the Petty Sessions Act in respect of acts committed outside their jurisdiction is expressly confined to crimes and offences, and does not apply to cases of a civil nature, which they can only hear where the matter arises within the limits of their jurisdiction. The present is a case of a civil nature; and the desertion having taken place in Dublin the Newtownards magistrates would have no jurisdiction. It has been argued that sect. 2 of the Act of 1886, providing that a summons under the Act may be granted and served as in cases of assault, would give the Newtownards magistrates jurisdiction to hear the case; but that, as we submit, is merely a procedure section.

[They also referred to 48 Geo. 3, c. 140, sect. 31; 5 & 6 Vict. c. 24, sects. 25, 65, 66, 67, 68; 44 & 45 Vict. c. 69, sect. 30: *The Queen* (*Cork Butter Market Trustees*) v. *Justices of Cork* (1).]

Rice, in reply:—

The argument on the other side rests on the assumption that the provisions of 5 & 6 Vict. c. 24, relied upon, are substantially identical with those in Jervis's Act. But this is not so. In 5 & 6 Vict. c. 24, warrants and summonses are dealt with in separate sections. Section 48, which gives power to serve out of the district, is expressly confined to warrants; while section 49, which deals with summonses, contains no power to serve out of the district. No such distinction is to be found in Jervis's Act. The object of section 51 of 5 & 6 Vict. c. 24, enabling a warrant to be issued without a summons having been first issued, was to meet the case of a defendant who had left the district, or was resident out of it, in which case a summons could not be issued. It has not been the universal practice of Dublin Divisional Magistrates to issue summonses for service out of their jurisdiction. Mr. Carton, when a Divisional Magistrate, refused to issue such summonses. *Leyden's Case* (2) was not decided solely on the grounds of the special provisions in sections 10 and 11 of the Petty Sessions Act.

Cur. adv. vult.

(1) 32 L. R. Ir. 542.

(2) [1907] 2 I. R. 160.

LORD O'BRIEN, L.C.J. :—

On the 23rd July, 1908, Mr. Swifte, one of the Divisional Magistrates of the Dublin metropolitan district, issued a summons against Mr. Redding, the defendant in these proceedings, directed to him, then resident at Newtownards, requiring him to show cause at one of the Metropolitan Police Courts in Dublin, as to why, having deserted his wife, Hannah Redding, he should not pay such weekly sums as might be in accordance with his means.

This summons was duly served on Redding at Newtownards. He did not appear according to the exigency of the summons served, and Mr. Swifte made in his absence, on the 31st July, an order directing him to pay to his wife a certain weekly sum. The principal question before us is, Had the Divisional Magistrate jurisdiction to issue the summons for service at Newtownards, outside the *local* limits of jurisdiction? and had he authority to make, in the absence of the defendant, Redding, the order he did make? Putting the case in an abstract rather than in a concrete way, has a Divisional Magistrate of the metropolitan area jurisdiction to issue a summons in the nature of judicial process for service outside the physical local limits of the metropolitan area? By a summons in the nature of judicial process, I mean not a mere notice, but a summons that can be acted upon—that a judicial determination can be founded upon—in the absence of the defendant. I refer to what I said in *Leyden's Case* (1) as to a summons being in the nature of judicial process—see p. 164 of the report. This is the principal question we have to decide.

There is a preliminary question which in our opinion presents little difficulty—it is this. Jurisdiction is given by the 1st section of the Act of 1886 to two Justices of the Peace, or any Stipendiary Magistrate. From that Act Scotland is expressly excluded, and therefore, according to the ordinary rules of construction, it applies to Ireland as well as to England. It has been argued that Stipendiary Magistrate, the word used in that Act, does not include a Divisional Magistrate, though the Act of 1886 applies to the whole of Ireland. It would be strange indeed if in the metropolis of Ireland—in the metropolitan area—where the only magis-

(1) [1907] 2 I. R. 160.

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terial authority is a Divisional Magistrate, that the expression "Stipendiary Magistrate" did not include a Divisional Magistrate, and that the Act so far as the metropolitan area was concerned was a dead letter. We would be authorized to do much violence to the language of the Act of Parliament to avoid this result; but the language of the Act requires no such drastic treatment, as the expression "Divisional Magistrate" practically falls in with the description of Stipendiary Magistrate. A Divisional Magistrate is a magistrate with a somewhat larger stipend than the ordinary magistrate. All the members of the Court have no difficulty in holding that the expression "Stipendiary Magistrate" includes in the particular Act before us a Divisional Magistrate of the city of Dublin. Indeed, I think that section 12 of 58 & 59 Vict. c. 39, and the schedule therein referred to, substantially decide the question.

But coming to what I have styled the principal question in the case, let me see how it has been argued. It has been asserted that *Leyden's Case* (1) concludes the controversy before us; that that case establishes that in the case of a summons it could not be served generally throughout Ireland, outside the county—outside the *local* limits of jurisdiction—and that we should hold in this case that the jurisdiction to serve a summons is confined to the metropolitan area. In *Leyden's Case* (1) the body of the Judges dissented from the judgments of Lord Justice Holmes, then Mr. Justice Holmes, and my brother Madden in *The Queen* v. *Justices of Cork* (2). But why? By reason of the effect we attached to certain provisions in the Petty Sessions Act, with which we are not now dealing; and by reason of the practice that had prevailed, or rather, I should say the absence of a practice to serve summonses outside the local limits of jurisdiction.

The Petty Sessions Act in its 10th section specially provided that a defendant could be proceeded against where he resides, and the 11th section of that Act provided that a summons could be served, not in Ireland generally, but in the adjoining county. We held that this special provision for serving a summons in the adjoining county indicated a disability to serve it generally

(1) [1907] 2 I. R. 160. (2) 32 L. R. Ir. 542.

throughout Ireland. Indeed, but for the 10th and 11th sections of the Petty Sessions Act, which are not to be found in the 5 & 6 Vict. c. 24, the Lord Chief Baron would have come to a different conclusion from that at which he arrived. He would have concurred in the judgments of Lord Justice Holmes and my brother Madden in *The Queen* v. *Justices of Cork* (1). He is reported to have said:—"The case has been twice argued. We have received from the learned counsel every assistance; and, whilst the case has stood for judgment, the Judges have met more than once to discuss the question in all its details. For myself, I may say that I have not only read and re-read the elaborate judgments I have referred to, but that I have, to the best of my ability, tested every step in the reasoning of each of them. The conclusion at which I have arrived is that, were it not for the introduction into section 10 of our Petty Sessions Act of a few words that do not occur in the corresponding section of the English Act (11 & 12 Vict. c. 43), from which section 10 was mainly taken—and for a provision at the end of section 11, to which there is no equivalent in the English Act—the construction of the English and Irish Acts ought to be identical; and that, upon that construction, there would be jurisdiction to serve the summons in the foreign county. I have however, not without some fluctuation of opinion, arrived at the conclusion that the introduction of those words into section 10 effectually removed the basis upon which the extended construction which had been given to the English Act must have rested, and that the provision in section 11, taken in connexion with the above words so introduced, affirmatively evidences a more limited intention, and consequently that the more extended construction cannot be given to the Irish Act."

This passage entirely bears out what I say. The Chief Baron expressly states that he would have agreed with Lord Justice Holmes and my brother Madden but for the two sections of the Petty Sessions Act to which I have referred. Lord Justice Holmes, then Mr. Justice Holmes, and my brother Madden, as it will be seen by reading their judgments, had examined in minute detail

(1) 32 L. R. Ir. 542.

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the provisions of the English Act, Jervis's Act, and had shown that that Act gave jurisdiction to serve a summons—process—throughout England generally. The Lord Chief Baron expressly agreed with the learned Lord Justice and my brother Madden as to the effect of Jervis's Act. Now, then, what have we in 5 & 6 Vict. c. 24 as distinguished from the Petty Sessions Act? Practically, if not identically, the same words as are to be found in Jervis's Act. I mean of course the same words as to service of process. I would have entirely agreed with the view of Lord Justice Holmes and my brother Madden but for the distinctive provisions of the Petty Sessions Act, and the established practice not to serve a summons generally throughout Ireland.

I find I am reported to have said in *Leyden's Case* (1) (at p. 170 of the report):—"Then, on the whole case, whether we regard the practice and state of the law before the Petty Sessions Act, or the special provisions of that Act, there is, in my opinion, no authority in a magistrate who issues a summons to direct its service generally through Ireland. But though I have gone into the practice and state of the law before the Petty Sessions Act, I am quite content to rest my judgment on the provisions of that Act alone—especially those distinctive provisions that are not to be found in Jervis's Act."

My brother Wright put the matter very clearly in his judgment:—"Jervis's Act (11 & 12 Vict. c. 43) was passed for England in the year 1848. It relates entirely to cases of summary jurisdiction, summary convictions, and orders. Under it the jurisdiction of Justices in England to issue a summons for service outside their own or an adjoining county, in summary cases, is unquestioned in practice; it is so laid down in all the English text-books on the subject; and, if not decided, it is recognized, or at all events assumed, to be the law in two reported cases, *The Queen* v. *Lightfoot* (2) and *Berkley* v. *Thompson* (3), both cases under the Bastardy Acts; and in truth a careful examination of the different sections of the English Act would lead inevitably to this conclusion. On this matter I would only refer shortly to the judgment of Holmes, J. (at page 566), in *The Queen* v. *The Justices of*

(1) [1907] 2 I. R. 160. (2) 6 E. & Bl. 822. (3) 10 App. Cas. 45.

Cork (1), in which several sections of Jervis's Act are closely analysed, and this conclusion is in his judgment clearly shown to follow."

But what reference is made in *Leyden's Case* (2) to the practice with reference to the service of summons outside the local limits of jurisdiction? I find I am reported to have said:—"There is no trace of any practice in Ireland which, in any way, sanctioned the proposition contended for by the complainants in this case. There is no trace of any practice sanctioning the contention that a summons may be served generally throughout Ireland outside the local limits of the jurisdiction of the magistrate who authorizes the issue of the summons. On the contrary, the practice was the other way." I then went into the authorities at considerable length: see pp. 162, 163 of the report.

But what is the practice under 5 & 6 Vict. c. 24 in the metropolitan area, which is expressly excluded from the Petty Sessions Act. We thought it well to inquire from the Divisional Magistrates what that practice has been, and we owe to the courtesy of the Chief Magistrate the letter which I will now read:—"January 14th, 1909. To the Lord Chief Justice—The Chief Magistrate begs to say that the uniform practice here, which has prevailed so far back as our records enable us to say—certainly for thirty years—and still prevails, has been to issue summonses for cases arising within the police district for service on defendants outside that district. The only magistrate who declined to follow that practice was the late Judge Carton, who, when a magistrate here in 1898, refused to issue such summonses. The matter being referred to the then law advisers, they advised that Mr. Carton's opinion was erroneous. Mr. Carton, meanwhile, was appointed a County Court Judge, and the matter dropped."

This letter shows that the practice under 5 & 6 Vict. c. 24 is the very opposite to what it was in districts outside the metropolitan area. So far, then, what have we? This—that *Leyden's Case* (2), so far from being an authority against the view Mr. Swifte has taken, largely tends, having regard to the reasons upon which it was founded, to support that view.

(1) 32 L. R. Ir. 542.

(2) [1907] 2 I. R. 160.

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But now I come to 5 & 6 Vict. c. 24, and I wish to emphasize in the most emphatic way that it is a proceeding under that Act with which the case is conversant. I am not dealing with a proceeding conversant with matters that arose outside the limits of the metropolitan area, and brought under the provisions of the Petty Sessions Act. I am not dealing with a case as to whether, desertion being a continuing act, jurisdiction may follow the person of the deserted wife, such as was apparently contemplated by the Bastardy Acts. I desire to be very clear as to this. This case arose within the metropolitan area; the wife, the complainant, is resident within that area, and the proceeding is under the 5 & 6 Vict. c. 24, before Mr. Swifte, a Divisional Magistrate. What, then, are the relevant provisions of the 5 & 6 Vict. c. 24? The 48th, 49th, 50th, and 51st sections of the Act are all those which are conversant with the service of process by summons or warrant. The 48th section provides, as stated by the marginal note, that a warrant may be served outside the local limits of the jurisdiction. It may go directly from the Divisional Magistrate, and need not be backed to render it effective outside the local limits of jurisdiction, as was necessary under the Petty Sessions Act. The efficacy of backing is dealt with elaborately in the judgments in *Leyden's Case* (1): see the concluding sentences of the Chief Baron's judgment at p. 175 of the report. Warrants issued by the Metropolitan Divisional Magistrate are effective by reason of their inherent force throughout the country generally—throughout Ireland. If they derive their efficacy from the hand of the Divisional Magistrate alone, and their original efficacy prevails without any extrinsic operation throughout the entire country, this shows how general and unlimited the jurisdiction of the Divisional Magistrate is. Why, then, should there be a more limited jurisdiction in the next subsequent section, namely, the 49th? In my opinion, the areas of jurisdiction in civil and criminal cases contemplated by that section are co-extensive. The warrant to compel appearance referred to in the closing sentence of the 49th section should have ascribed to it an efficacy co-extensive with the warrant mentioned in the 48th, and it would appear

(1) [1907] 2 I. R. 160.

to me the extent of operation—the area of efficacy—as regards a civil summons and a warrant is identical. No doubt the procedure is different. In a criminal case, having regard to the fact that restraint of liberty and infliction of punishment are involved, it was provided that before a criminal case was heard and determined the accused should be personally present. These considerations do not apply to a civil case. If, after the service of process calling upon a defendant to appear, he did not do so, the case might be heard in his absence, without his being brought up on a warrant, provided the case is a civil proceeding.

Is the present a civil proceeding? I am of opinion that it is. It is quite plain that the defendant could give evidence as to his means. He is personally competent to give evidence, which, of course, he would not be in a criminal case. Indeed, the Bastardy Act, according to the provisions of which payment is to be enforced, plainly contemplates in its 4th section that a defendant may give evidence: see 35 & 36 Vict. c. 65, sect. 4. I think *Berry's Case* (1) practically decides the question. "Payment" may be enforced on an affiliation order. It is enforcement of payment that is sought, and not the infliction of punishment. A man who does not pay is not criminally punished for a crime or criminal offence; but when every other method of enforcement has failed, he is subject to imprisonment, but not as a punishment for the commission of a crime. Before the Debtors Act a debtor could be imprisoned for a non-payment of the debt; but this fact did not attach a criminal character to a proceeding for the recovery of a debt. A *ca. sa.* was a method of execution, but it did not change the character of the civil proceeding. When the Legislature wished to enact that certain matters were to be considered criminal offences, it uses apt and explicit language: see 35 & 36 Vict. c. 57, Part 2, section 11. However, it is unnecessary to examine this aspect of the case so elaborately, as all distinction as to hearing in the absence of the defendant, whether in civil or criminal cases, is put an end to by the 7th section of the 34 & 35 Vict. c. 76, which was not cited in the argument.

I am of opinion that the conditional order should be discharged with costs.

(1) Bell's Crown Cases, p. 46.

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Before I conclude I desire to point out a matter on which I desire to be very emphatic, that the only questions argued before us were those I mentioned—first, as to the expression "Stipendiary Magistrate"; secondly, as to the authority of a Divisional Magistrate to direct service of summons outside the metropolitan area.

MADDEN, J.:—

This is the third occasion upon which I have had to consider the effect of a summons issued by a magistrate for service outside the territorial limits of his jurisdiction. In the first of these cases, *The Queen* v *Justices of Cork* (1), heard in the year 1893, the Court was equally divided, and the question remained undecided until the year 1906, when it was set at rest, so far as proceedings under the Petty Sessions Act are concerned, by the unanimous decision of the full Court of the King's Bench Division in *Great Southern and Western Railway Co.* v. *Leyden* (2), to which I was a party. I now again concur in the unanimous decision of this Court, and I do so with greater satisfaction inasmuch as my concurrence on this occasion is not a surrender of my individual opinion to the weight of authority, but a decision in accordance with the view which I take of the statute under consideration.

The question before us arises, not under the Petty Sessions Act, but under the statute defining the jurisdiction of the Divisional Magistrates of the city of Dublin (5 & 6 Vict. c. 24), which contains no provisions corresponding to the 10th and 11th sections of the Petty Sessions Act. In fact, as my Lord has pointed out, the question for decision in the present case is in substance the same as if it had arisen under Jervis's Act; and a careful consideration of the judgments delivered in *The Queen* v. *Justices of Cork* (1) and in *Leyden's Case* (2) leads me to the conclusion that there was, in these cases, a unanimous expression of opinion as to the construction of Jervis's Act which is applicable to the statute now under consideration. Therefore there is, in my opinion, no inconsistency whatsoever between *Leyden's Case* (2) and the decision that we have arrived at in the present case, with which I entirely concur.

(1) 32 L. R. Ir. 542. (2) [1907] 2 I. R. 160.

Wright, J. :—

The summons which originated the proceedings, the subject of the present application, was brought under sect. 1 of the 49 & 50 Vict. c. 52, and required the defendant to show cause why he should not be ordered to pay to his wife, the complainant, for her support, such weekly sum, not exceeding £2, as might be in accordance with his means, and any means the complainant might have. The summons was issued by Mr. Swifte, one of the Divisional Justices, and was duly served on the defendant at Newtownards, in the county of Down; and on 31st July, 1908, an order was made by Mr. Swifte, in accordance with the terms of the section, for payment by the defendant to his wife of a weekly sum. The order recites, in accordance with the facts, that the defendant was duly served with the summons, but did not appear.

I entertain no doubt but that a Dublin Divisional Magistrate can issue a summons, and make an order under the Act, in all cases arising within his district, just as a Justice or Justices at Petty Sessions can act in cases properly before him or them. The statute (49 & 50 Vict. c. 52) provides that the summons is to be applied for, granted, and served in the same manner as summonses are now applied for, granted, and served in cases of assault (sect. 2), and the payment of any sum of money ordered to be paid by the husband for the support of his wife may be enforced against him in the same manner as the payment of money is enforced under an order of affiliation (sect. 1 (1)). This latter provision refers to sect. 4 of the 35 & 36 Vict. c. 65, an exclusively English Act.

From the nature of the relief sought, the inquiry as to means upon which it is clear that both complainant and defendant can be examined, and the order made, it is, in my opinion, certain that the matter of the summons is of a civil nature. The net question for our decision is this:—Has a Dublin Divisional Magistrate power, on a complaint made by a wife of desertion of her by her husband within the Dublin police district, to issue a summons against the husband resident in another county, in the present case the County Down, and on proof of service of the summons on him, to proceed, if he does not appear, to hear the

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complaint and make an order against him? *Leyden's Case* (1) has been much relied on; but it was a decision upon the powers of Justices at Petty Sessions, and turned largely upon the provisions of the Petty Sessions (Ireland) Act (14 & 15 Vict. c. 93). It accordingly becomes necessary to see in what respects the powers and jurisdiction of a Justice or Justices at Petty Sessions and those of a Dublin Police Magistrate differ. The principal Act defining the powers and jurisdiction of the Dublin Divisional Magistrates is the Dublin Police Act of 1842 (5 & 6 Vict. c. 24), which amends several earlier Acts, and, among others, the 48 Geo. 3, c. 140.

Section 49 of the Act of 1842 empowers the Divisional Justice to summon the party charged, on complaint being made before him of any matter which the Justice is authorized to hear and determine summarily; and on proof of service of the summons, the Justice may proceed, in all cases which are not of a criminal nature, in the absence of the party charged, and may hear and determine the case in the absence of such party. Section 50 prescribes the mode of service of the summons; sect. 51 deals with the issue of a warrant for the apprehension of a person charged with an offence; and section 52 prescribes the mode of enforcing the appearance of a witness. Section 48 makes a distress or levy warrant, or warrant to compel the appearance of any person, or warrant for the arrest of any person charged with an offence, capable of being served or executed *out of the district in respect of any matter arising within the police district.* To the like effect is the earlier statute, 48 Geo. 3, c. 140, s. 31, giving to warrants issued by a Divisional Justice for the arrest of a person charged with any treason or felony committed within the police district of Dublin, full force and effect in any part of Ireland. Section 70 of the Act of 1842 (5 & 6 Vict. c. 24) prescribes the mode of procedure before a Divisional Justice or Justices in the case of all offences punishable, whether under that or any other Act, on summary conviction, where the offence was committed within the limits of the police district.

It seems clear that the jurisdiction of a Dublin Police Magistrate is confined to matters, whether civil or criminal, arising

(1) [1907] 2 I. R. 160.

within the limits of the Dublin police district. It is also certain that his warrant can, without backing, be executed in any part of Ireland.

In these two essential particulars there is a difference between his jurisdiction and powers and those of an ordinary Justice or Justices at Petty Sessions. Under section 10 of the 14 & 15 Vict. c. 93, a Justice or Justices at Petty Sessions can proceed—(1), either when the offence has been committed within the limits of his jurisdiction, or (2), when the defendant is resident within the limits of the Justice's jurisdiction, but the offence has been committed elsewhere out of his jurisdiction; and the Justice's warrant has no effect outside his own county until backed. Other essential differences will be found in the two Acts, the Dublin Police Act of 1842 and the Petty Sessions Act of 1851, *e.g.*, as to enforcing the attendance of witnesses. Compare section 52 of the Act of 1842: "The Justices may summon any witness to appear and give evidence before him upon the matter of any offence cognizable by him," &c.; and sect. 13 of the Petty Sessions Act: "Whenever it shall be made to appear to any Justice that any person *within the jurisdiction of such Justice* is able to give material evidence," &c. And by sect. 41 of the Petty Sessions Act (14 & 15 Vict. c. 93) the Dublin metropolitan police district is wholly excluded from the operation of that Act, except as to backing or executing warrants (which refers to the transmitting of Justices' warrants to the Dublin Metropolitan Police Commissioners under section 27 (2) of 14 & 15 Vict. c. 93).

Great Southern and Western Railway Co. v. *Leyden* (1) was a decision under the Petty Sessions Act (14 & 15 Vict. c. 93), and decided that there is no jurisdiction under that Act to serve a summons in a county, not being an adjoining county, so as to enable the Justices of the county in which the offence occurred to hear and determine the case in the absence of the defendant. That decision proceeded mainly, if not entirely, upon a consideration of the provisions of the Petty Sessions (Ireland) Act, not applicable, as already mentioned, to the Dublin police district; and the essential differences between that Act and the English Act 11 & 12 Vict. c. 43. In particular, weight was given to the final clause

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of the 11th section, which, in the language of Lord O'Brien, L.C.J., "threw much light upon, if it did not determine, the question under discussion," p. 167. See also pp. 169 and 170 of his judgment.

The Chief Baron in the same way (p. 172) expressly rests his judgment upon the language used in sections 10 and 11 of the Irish Act (14 & 15 Vict. c. 93), and particularly the last paragraph of section 11, as limiting the jurisdiction of Justices in Ireland by words not found in the English Act, but for which he would construe the Irish Act and the English Act in the same way, *i.e.*, as not imposing the territorial limit of the county of the Justice issuing the summons, or the adjoining county, to service of that summons, but as enabling it to be effectively served in any county in Ireland. The same reasoning runs through the judgments of, if not all, almost all the members of the Court; and here I may be pardoned if I quote the concluding sentence of my own judgment in that case as showing the ground of my decision: "The extension to the adjoining county in the proviso" (the concluding paragraph of section 11) "impliedly negatives such a contention." It is certain that the jurisdiction of the Dublin Divisional Justice arises from the place where the offence was committed (*i.e.* within the Dublin police district), and does not depend upon, and is irrespective of, the place of residence of the defendant.

The language of the English Act, 11 & 12 Vict. c. 43, so much discussed in *Leyden's Case* (1), closely resembles that used in the section of the 5 & 6 Vict. c. 24 already referred to. Section 1, which deals with cases of summary jurisdiction, civil and criminal, says, "an offence or act *within the jurisdiction of such Justice or Justices*"—in all such cases the Justice may issue his summons requiring the defendant to appear. The section provides for the mode of service of the summons, in language very similar to the language used in section 50 of the Dublin Police Act (5 & 6 Vict. c. 24), and it will be observed that in neither section are there any words to suggest that the service must be within, in one case the county, in the other the district, of the Justice issuing the summons.

(1) [1907] 2 I. R. 160.

The practice of the Dublin Police Magistrates has been to issue a summons for service on a defendant in any county where he may happen to be, where the matter of the complaint has arisen within the police district; and on proof of service of the summons on the defendant, if he chooses not to appear, to hear the case and determine it in his absence. This practice has been in existence for upwards of thirty years, and has never been questioned except for a brief period by the late Mr. Carton, K.C., then recently appointed a Police Magistrate, who felt doubts as to the extent of his jurisdiction; but, with this exception, since his time, as before it, the practice has been uniform in Dublin of summoning a defendant living outside the police district, and hearing cases of a civil nature in his absence, on proof that he was duly served with the summons. The practice in England under the 11 & 12 Vict. c. 43 has also in the same way, and without question, ever since the passing of that Act, been to issue and serve a summons on a defendant, outside the county of the Justice issuing the summons, to answer a complaint in all matters, civil and criminal, summarily determinable, arising within the jurisdiction of the Justice issuing the summons. No decision, strictly speaking, to this effect is to be found on the English statute, but the practice is certain and settled, and is treated as unquestioned: see *Berkly* v. *Thompson* (1). The Dublin Police Act of 1842 has thus been construed in practice in the same way as the English Act, to which, as I have shown, its language is very similar. It is to my mind certain that the question now raised would never have been thought of but for the decision in *Leyden's Case* (2), decided under the Petty Sessions Act of 1851, and expressly grounded upon the special provisions of that Act—provisions absent from the English Act, 11 & 12 Vict. c. 43, and from the Dublin Police Act of 1842.

I am of opinion that, consistently with the language and general framework of the Act of 1842, and previous Acts, and the settled practice prevailing since the Act of 1842 was passed, the jurisdiction of a Dublin Divisional Justice arises from the place where the cause of complaint arose, namely the Dublin

(1) 10 App. Cas. 45, 54.
(2) [1907] 2 I. R. 160.

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police district, and does not depend upon, and is irrespective of, the place of residence of the defendant; and that a summons can be issued by him against a defendant and effectively served in any county in Ireland in which the defendant may reside or be found.

Wright, J.

I agree that the conditional order ought to be discharged.

DODD, J.:—

The judgments already given by members of the Court, who were also members of the Court that decided the case of *The Great Southern and Western Railway Co.* v. *Leyden* (1), relieve me from the necessity of dealing at all with the part of the argument addressed to us that this case is ruled by that case, and I am free to devote my attention solely to the consideration of the statutes on which the jurisdiction of the Divisional Magistrates in Dublin to deal with such an application is founded.

By the 1st section of the Act of 1886 it is enacted that it shall be lawful for a married woman who shall have been deserted by her husband, to summon her husband before any "Stipendiary" Magistrate; and by section 2 a summons under this Act shall be applied for, granted, and served as in cases of assault. The magistrate has jurisdiction to make an order, to be enforced as an order of affiliation. I concur in the judgment of the Lord Chief Justice that this 1st section gives jurisdiction to the Divisional Magistrates in Dublin as Stipendiary Magistrates, and I do not desire to add anything on that head, save this—Mr. Ronan's first contention is that the Act of 1886 does not apply to Ireland. In terms he says it does. But the phraseology is applicable to England, and England alone; the procedure is English, and the provisions for enforcing the order are English. An affiliation order is an English order; and though the words "as in cases of assault" may be applied to both countries, it is the English procedure that is pointed at. But he mainly relies on the phrase "Stipendiary Magistrate." He says there is no such person in Ireland as a Stipendiary Magistrate. He points out that in the Merchant Shipping Act (39 & 40 Vict. c. 180) it required a special

(1) [1907] 2 I. R. 160.

provision to make the term "Stipendiary Magistrate" applicable to a Resident Magistrate in Ireland, and the Divisional Justices in Dublin. But in the Summary Jurisdiction Act (Ireland) (25 & 26 Vict. c. 50), sect. 2, I find this collocation of words occurs :—"No Stipendiary Magistrate in Ireland, not being a Justice of the Police District in Dublin Metropolis, shall have any jurisdiction" in the matters therein provided for. There would seem, therefore, to be warrant for holding that it is within the compass of the English language, and within the competence of Parliament, to include the Divisional Justices of Dublin within the class of Stipendiary Magistrates without any special section so enacting.

The important matter argued before us was—Has the Divisional Justice power to issue a summons for service outside the metropolitan district? The answer must be sought in the various Acts giving jurisdiction. Section 41 of the Petty Sessions Act excludes the Dublin metropolitan district from the operation of that Act, and we must find the answer to the query in the Acts relating to the district itself.

We may take up the legislation with 48 Geo. 3, c. 140, which is entitled an Act for the more effectual administration of the office of a Justice of the Peace, and for the more effectual prevention of *felonies* within the district of Dublin metropolis. That Act repealed various Acts of the Irish Parliament, as having been found insufficient for effectuating their purposes, and made a fresh start. It appointed eighteen Divisional Justices, six being barristers of not less than six years' standing, three being aldermen, three being sheriff's peers, or members of the Common Council of the city appointed by the Lord Lieutenant; and six being aldermen or sheriff's peers elected by the Corporation.

The things then thought of most moment were treasons and felonies on the one hand, and police regulations on the other. The intermediate jurisdiction for misdemeanours and offences punishable summarily did not receive much attention; and the matters of a civil nature were few; and there were no procedure clauses. Each of the eighteen Justices was to be a Justice of the Peace within every part of the district, and to have the ordinary jurisdiction of a Justice. By section 31, "in case

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any person or persons charged on oath of one or more credible witnesses with any treason or felony committed within the said police district of Dublin metropolis shall fly from the same, or remove to, or be found or be in, any other part of Ireland, then, and in every such case, the warrant or warrants of the said Divisional Justices, or any of them, shall have full force and effect in any part of Ireland to which such person or persons may have fled or removed, or *where such person* or persons *shall* be found or *be*; and all gaolers and keepers of prisons are hereby authorized and directed to receive into their custody such person or persons when apprehended or in custody, under or by virtue of such warrant, and each and every of them in safe custody to keep until transmitted to the said district of Dublin metropolis, any law or usage to the contrary notwithstanding."

There was no power added to the inherent jurisdiction of a Justice in respect of misdemeanours, or in respect of the exercise of summary jurisdiction; and though the magistrate had power to issue a warrant in case of a felony, for execution in any part of Ireland, there was apparently no corresponding power given to a constable of the district to execute such a warrant outside his district: *cf. Rex* v. *Weir* (1).

The number of magistrates was reduced by 5 Geo. 4. c. 102. The magistrates of the Castle Division were made Justices for Dublin, Wicklow, Kildare, and Meath, and the constables were authorized to execute any warrants granted by the Divisional Justices of the Castle Division *in the four counties*. But no power was given to the constables further or otherwise; and the Divisional Justices, though magistrates for the four counties, were not given jurisdiction as to offences in those counties that did not amount to treason or felony. The only summary jurisdiction referred to *eo nomine* in that Act is the jurisdiction to determine disputes between pawnbroker and borrower; to award a sum to be paid, and in default of payment to levy the money awarded by distress, and for want of distress to imprison the party for one month.

The next Act is the 6 & 7 Wm. 4, c. 29. It still further reduces the number of magistrates, makes one district, and

(1) 1 L. & C. 288.

makes special provisions for offences punishable on summary conviction, and as to procedure enacts as follows (section 37):— "And for the more effectual prosecution of offences punishable on summary conviction by virtue of this Act, be it enacted, that where any person shall be charged on the oath of a credible witness, with any such offence before any Justice of the Peace, the Justice may summon the person charged to appear, &c., and if the person charged shall not appear, upon proof of due service, &c., the Justices before whom he ought to have appeared may either proceed to hear and determine the case *ex parte*, or may issue their warrant for apprehending such person, and bringing him before them." This provision was isolated, and was not brought into any general scheme of jurisdiction. It did not say whether a summons might or might not be served outside the district, and, save as in the section enacted, there was no procedure. The 7 Wm. 4 & 1 Vict. c. 25 further reduces the number of Justices, extends the boundaries of the district, but does not confer any new jurisdiction in the matter of our present inquiry. The 1 & 2 Vict. c. 63 did not make any change either. The 2 & 3 Vict. c. 78 gives a power by section 16 to issue a warrant for the levy of any penalty, or the committal of any person, in the form and manner directed by the Act under which the penalty has been or shall have been imposed, but was also silent as to whether such a warrant could or could not be executed outside the district. And if these sections stood alone and were not modified by the subsequent legislation, a strong presumption might arise, that the power to issue a summons on summary matters, or a warrant in any case other than treason or felonies, to be served or executed out of the district, was not conferred upon the Justices.

I can find no other enactment prior to the Act of 5 & 6 Vict. c. 24, bearing on the subject of our inquiry. Before the Act of 5 & 6 Vict. c. 24 came to be passed, then, we may sum up the powers of the Divisional Justices and the Dublin Metropolitan Police as follows:—

1. In treasons or felonies the Justices had power to issue a warrant for the apprehension of any person who had committed an offence inside the Dublin metropolitan police district, to be executed wherever the person charged was in Ireland.

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2. The warrant for arrest could apparently only be executed by the Dublin police inside the four counties of Dublin, Wicklow, Kildare, and Meath.

3. There was summary jurisdiction in certain misdemeanours against offenders who had committed an offence in the metropolitan district.

4. The warrant to issue in such a case could only be granted on proof of the service of the summons, and that the accuser had failed to appear; but it was not clear that either summons or warrant in such a case could be served or executed outside the district.

5. There was apparently no statutory power of enforcing the attendance of a witness.

6. There were civil matters in which distress warrants could be issued if default were made in paying moneys ordered to be paid; but it was not clear that such warrants could be executed outside the district.

7. The procedure was not carefully provided for, and was to be found in a straggling way throughout the various Acts.

In this state of the law the Act of 5 & 6 Vict. c. 24 was passed. It is entitled an Act for improving the Dublin Police, and it recites that it is expedient for the more complete efficiency of the said police to make further provisions and regulations similar to those established in the police district of London Metropolis, under the then recent Acts. It provides penalties for offences against traffic, for nuisance, and such like; and makes provision for disputes of various kinds. It gives jurisdiction to order compensation for wilful damage by tenants. It confers powers to deal summarily with cases of excessive distress, and to order delivery of goods unlawfully detained. It creates or declares various misdemeanours. It makes certain provisions as to informations, and embraces therefor provisions—(*a*) as regards felonies; (*b*) as regards misdemeanours; (*c*) as regards offences which are punishable on summary conviction; (*d*) as regards orders for money payments, and compensation and other matters of a civil nature; and (*e*) it provides a little code of procedure, not very elaborate, but sufficient.

It is to be borne in mind that when this Act was passed, as the Solicitor-General pointed out, there was no power to proceed

in the district in which the offender was. But I do not lay stress upon that. I think the Act itself gives sufficient guidance. It enacts (*inter alia*) :—

1. Every distress or levy warrant, or search warrant, or warrant to compel the appearance of any person, or warrant for the apprehension of any person charged with any offence, issued by any of the Divisional Justices or by the Commissioners of Police, or either of them, in respect of any matter arising within the police district, may be served or executed out of the district. Before this, it was only warrants for arrest in felonies and treasons that could be so executed. Now, all warrants, distress, levy, search, to compel appearance, to apprehend, can be executed out of the district.

2. Such warrants may be executed out of the district by any constable of the Dublin Metropolitan Police. The only power apparently before for a Dublin policeman was to execute in the four counties.

3. The Justice may summon the party charged, and may, in default of appearance in a criminal matter, issue his warrant.

4. But he is not bound to do so. He may, *without issuing any summons*, forthwith issue his warrant for the apprehension of *any person* charged *with any offence* cognizable before him, whenever good grounds for so doing shall be stated on oath before him.

5. Matters which are not of a criminal nature are dealt with as being on the same basis as criminal matters as regards procedure, except in one particular. If the party does not appear in answer to the summons, the cause can be heard in his absence.

6. Extensive powers are given to enforce the attendance of witnesses; and these powers are not in terms, nor by reasonable inference, limited to witnesses inside the district.

The forms of summons provided in the schedule apparently are intended to apply to the four classes of jurisdiction: felonies, misdemeanours, matters of summary jurisdiction, and matters of a civil character. No separate form is provided for a summons in a civil matter. The forms would be suitable if "offence" be construed to include civil wrong, as well as criminal wrong. The important thing is, that no distinction is drawn between the two; and if there be a jurisdiction over the "offender" wherever he be

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in Ireland, either to cause him to appear, or to proceed in his absence if the offence be a criminal one, there would seem to be a necessary intendment that a like jurisdiction existed in those civil matters in respect of which jurisdiction was given, especially having regard to the careful limitation of authority in section 49. That limitation is that if the case be not of a criminal nature, the Justice may hear and determine it in the absence of the party, but may not issue a warrant to compel appearance. If, however, the proceedings so commenced terminate in a warrant, a distress warrant, a levy warrant, or other warrant, such warrant can be executed outside the district. And though the "procedure" under the Act of 1886 is to be as in cases of assault, I think that applies only to procedure, and does not give jurisdiction, either, *e.g.*, to punish as for assault, or to issue a warrant to compel the appearance of a person against whom a civil right is sought to be enforced. The Act of 1886 does, however, in my judgment, give the wife a right to go to the Justice as if it were a case of assault, to tell him her grievance, make her information or complaint, and describe the "offence" her husband has committed against her. The Justice may then issue his summons as if the case were one of assault, and, I think, have the husband served wherever he may be, inside or outside the district; served, in short, wherever a warrant in a case suitable for warrant could be served.

The ground of my decision is that the jurisdiction for bringing offenders before the tribunal by summons in criminal matters, including assaults, must be inferred from the power granted to bring them by warrant, inasmuch as either with or without a summons the jurisdiction to issue a warrant attaches; and the jurisdiction to serve an offender in a civil case by summons must be considered to be co-extensive with the jurisdiction in criminal cases, inasmuch as they are treated as on the same basis, forming part of the same code; the only distinction drawn being that for default in not appearing, you can in the one case at once arrest, in the other you can hear the case in the absence of the defendant, and proceed to adjudicate.

Counsel for the defendant were obliged to admit that in assault cases there was jurisdiction to grant a warrant. They contend there is no jurisdiction to serve a summons, and they urge

that the extensive power as to warrant was conferred because there was no jurisdiction to serve a summons. It seems a more reasonable construction that the greater includes the less, and that all things reasonable and proper to be done by a judicious magistrate were included in the extensive powers given to him. If he ought not, in an ordinary case, to issue a warrant without first issuing a summons, the right to summon would follow. The right to give judgment in a Court implies a right to issue a process; and having regard to the entire scope of the powers given, I am of opinion that the Justices had the jurisdiction contended for.

I do not say whether, even apart from the general question, there is not enough in the peculiar jurisdiction conferred by the Act of 1886, to found an argument that the wife could get redress in the jurisdiction in which the husband had deserted her. I mention the matter because, though it was thrown out by the Solicitor-General, he struggled for the larger issue in this case in which he has succeeded, and it is unnecessary to determine any other issue. I wish, with the Chief Justice, to guard against deciding that the judgments in *Leyden's Case* (1) necessarily apply to the Act of 1886, which has certain features and peculiarities distinguishing it from the ordinary summary jurisdiction of Justices in Ireland. It may or may not be open to argument hereafter that even in Petty Sessions districts outside Dublin a deserted wife may have a right to have the magistrates of the district in which she is deserted proceed against her husband wherever he may be. That matter is not dealt with in this case.

Solicitor for the prosecution: *James Brady.*
Solicitor for the Crown: *Malachy Kelly.*

J. G. T.

(1) [1907] 2 I. R. 160.

Appeal. 1909.

Jan. 26.

TAYLOR *v.* THE GREAT SOUTHERN AND WESTERN RAILWAY CO. (1).

(1908. No. 15,778.)

Railway Company—Alleged negligence—Injury to passenger—Hand crushed by shutting of door—Cause of action—Remitting to County Court.

The plaintiff, a young girl, who was intending to emigrate to America, entrained at a station on the defendant Company's line *en route* to Queenstown. As the train was about to start she was saying good-bye to her friends from the door of the carriage, when a porter in the Company's service pushed two newly-arrived passengers past her. While the plaintiff had her hand at the side of the door, the porter opened it to introduce these passengers, and before she had time to withdraw her hand he shut the door, crushing the plaintiff's hand, and causing severe injuries to her. The train was in motion when this occurred.

On motion to remit the action for trial to the County Court :—

Held, affirming the decision of the King's Bench Division, that the action should be remitted, as no cause of action was shown.

APPEAL by the plaintiff from an order of the King's Bench Division remitting the action for trial to the County Court.

The action was brought to recover damages for personal injuries sustained by the plaintiff while a passenger on the defendant Company's railway, alleged to be caused by a servant of the Company negligently shutting the door of the compartment in which the plaintiff was standing, and crushing her thumb. The plaintiff did not allege that she was possessed of visible means. On the other hand, the serious nature of the injury reduced the question before the Court to whether any cause of action was shown.

The story of the accident as detailed in a letter dated the 24th November, 1908, addressed by the plaintiff's mother to the Company's secretary, and in the affidavit of the plaintiff sworn on the 11th January, 1909, to resist the motion to remit, which were substantially identical, was as follows :—

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

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On Saturday, the 21st November, 1908, the plaintiff, Margaret Taylor, started from Dundrum station at 12 o'clock noon for Queenstown, as she thought, on her way to America, where she had a situation taken, and friends to meet her. She got on to the train in Dundrum in due time, and as the train was starting was saying good-bye to her friends from the door of the carriage, when a couple of belated passengers arrived. The porter opened the door quietly, and the passengers were put or pushed in. The plaintiff had her hand at the side of the door when the porter opened it, and before she had time to withdraw it, the door was slammed by the porter and her thumb was completely crushed; the train was moving at the time.

Carrigan, for the appellant:—

Brennan v. *The Great Southern and Western Railway Co.* (1) is distinguishable from the present case. There the passenger placed his hand on the jamb of the door without any legitimate reason, and there was nothing to show that the station-master when closing the door was aware of the danger. Here the plaintiff was supporting herself while the porter pushed past her the two belated passengers. He must have seen her position. The train was actually in motion when he helped them in. In *The Metropolitan Railway Co.* v. *Jackson* (2), the accident was caused by other passengers trying to enter the compartment. In *Bullner* v. *London, Chatham, and Dover Railway Co.* (3) the plaintiff was pushed against the door by a passenger inside. This distinction was noticed by Mathew, J., during the argument. *Cohen* v. *Metropolitan Railway Co.* (4) seems to have gone mainly on the necessity for shutting the doors quickly on such a line. It was also plain that the person who slammed the door in that case did not see the position of the plaintiff. *Jones* v. *Great Western Railway Co.* (5) is a decision in favour of the present plaintiff. *Benson* v. *Furness Railway Co.* (6) was quite a different case. The plaintiff (a child) put his hand on the door while the train was

(1) 38 Ir. L. T. R. 177.
(2) 3 App. Cas. 193.
(3) 1 Times L. R. 534.
(4) 6 Times L. R. 146.
(5) 1 Times L. R. 333.
(6) 88 L. T. (N. S.) 268.

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moving; the porter shutting the door did not see that his hand was there.

Fitz Gibbon, K. C., and *Phelps*, for the Railway Company, were not called on.

THE LORD CHANCELLOR:—

We do not think it necessary to call on the defendants' counsel, inasmuch as having heard the case fully we see no ground for interfering with the order of the Court below. The letter of the plaintiff's mother and the plaintiff's affidavit are not in conflict. The dress of the girl got caught in the door—a very common thing—and a porter opened the door and released it. She was in a perfect position of safety after that. She wanted, however, to continue looking at her friends at the station, who had come to say good-bye to her. A porter came by, and while she was standing opened the door to let in some passengers who arrived after her, and in this there was no negligence on his part. It is quite evident that she maintained her standing position in order that she might still have the opportunity of looking at her friends, because she allowed the passengers to pass by her when entering; and when the door was again shut to, she, being in a standing position, lost her balance by reason of that, and tried to save herself by putting her hand on the door.

All the cases show that under such circumstances no action lies. In *Jackson* v. *Metropolitan Railway Co.* (1) there was a rush of passengers who tried to force an entrance. In *Bullner* v. *London, Chatham, and Dover Railway Co.* (2), the plaintiff received a push from a fellow-passenger, and to save himself put out his hand.

In her letter the mother stated: "As the train was starting she was saying good-bye to her friends from the door of the carriage, when a couple of belated passengers arrived. The porter opened the door quietly, and the passengers were put or pushed in. My daughter had her hand at the side of the door when the porter opened it, and before she had time to withdraw it, the door was

(1) 3 App. Cas. 193. (2) 1 Times L. R. 534.

slammed by the porter, and her thumb was completely crushed; the train was moving at the time."

It seems to me that the mother's letter and the affidavit are substantially the same.

Under these circumstances we cannot say that there is any cause of action disclosed by the affidavit.

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The Lord Chancellor.

FITZ GIBBON and HOLMES, L.JJ., concurred.

Solicitor for the plaintiff: *Frewin.*

Solicitor for the defendant Company: *Croker Barrington.*

W. G.

THE KING (AT THE PROSECUTION OF LAURENCE BUTLER, THOMAS O'BRIEN, PATRICK FLANNERY, THOMAS M'SOLEY, THOMAS KING, THOMAS BOURKE, JOHN KENNEDY, AND PATRICK BONFIELD) *v.* CYRIL E. BROWNE, AUDITOR OF THE LOCAL GOVERNMENT BOARD (1).

K. B. Div. 1909. Jan. 20–22. Feb. 8.

Local Government—Auditor—Surcharge—Illegal or unfounded payments—Members of Council—Accounting persons—Negligence or misconduct—Local Government Act, 1871 (34 & 35 *Vict. c.* 109), *s.* 12—*Local Government Act*, 1902 (2 *Edw.* 7, *c.* 38), *s.* 20.

Prior to the passing of the Local Government Act, 1898, the Nenagh Board of Guardians acquired in the electoral division of Nenagh, then within its jurisdiction as sanitary authority, sites for nine labourers' cottages, and obtained for the purpose from the Board of Works a loan, secured by mortgage, and repayable by instalments. After the passing of the Act, when the Board of Guardians had become the Rural District Council, the town of Nenagh was created an urban district, embracing the area upon which the nine labourers' cottages had been erected. The rights and liabilities of the two District Councils were adjusted by arbitration, portion of the award being that the interest of the Rural Council in the nine plots, and the cottages erected thereon, was to be transferred forthwith to the Urban Council, together with the liability for the repayment of the instalments on the loan. The legal requisites for effecting the transfer under the award were not carried out,

(1) Before LORD O'BRIEN, L.C.J., and MADDEN, WRIGHT, and DODD, JJ.

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and although the Rural Council was constantly pressing its solicitor, it did not resort to peremptory measures to have this done. In the meantime the Rural Council continued to pay the instalments on the Board of Works loan, for which it remained legally liable until the transfer of the cottages was complete. Thereupon the Local Government Board auditor, considering these payments to be unfounded and illegal, surcharged the councillors who by their signatures authorized the payment of the instalments:—

Held, that the payments were neither unfounded nor illegal within the meaning of section 12 of the Local Government Act, 1871 (34 & 35 Vict. c. 109).

Held, also, assuming that the councillors could, in a case such as the present, be held responsible for negligence or misconduct as "accounting persons" within the meaning of sect. 20 of the Local Government Act, 1902 (2 Edw. 7, c. 38), that there was here no finding of negligence or misconduct which would justify the surcharge.

Per Lord O'Brien, L.C.J.: The Court does not decide whether, in a case like the present, the auditor has authority to hold that the Council, or its members, are, or are not, guilty of negligence as accounting persons. This question has not yet been judicially decided—it has not been as yet made the exclusively operative ground of decision.

CERTIORARI.

The Rural District Council of Nenagh prior to the passing of the Local Government (Ireland) Act, 1898, being then the Guardians of the Poor of the Nenagh Union, and also rural sanitary authority, acquired a number of plots of land and erected cottages thereon under the provisions of the Labourers (Ireland) Acts, and amongst others erected nine labourers' cottages within the electoral division of Nenagh and the boundary of the township of Nenagh which then formed part of the rural sanitary district of the Guardians. The money required for the purpose of purchasing sites and erecting these cottages was duly advanced by the Board of Works, and a mortgage deed to secure the entire sum so advanced was executed by the Guardians to the Board of Works, and the instalments required to repay principal and interest on the advance had since been regularly paid to the Board of Works by the Guardians, now the Nenagh Rural District Council.

Under the provisions of the Local Government (Ireland) Act, 1898, the said sanitary authority was constituted the Nenagh Rural District Council. Shortly after the passing of the Local

Government Act, the Town Commissioners of the town of Nenagh applied to have the town created an urban district, and an order was made accordingly. Previously to the making of this order the town of Nenagh had formed part of the electoral division of Nenagh, under the control of the rural sanitary authority, and, in addition to the nine cottages which had been erected in the township area, the rural sanitary authority had also recently constructed waterworks to supply water to the town of Nenagh, and incurred other considerable outlay for sanitary works in the township, the expense of which was levied equally over the urban and rural portions of the electoral division of Nenagh. Inasmuch as by the order constituting Nenagh an urban district the jurisdiction of the Rural Council over the urban portion of the Nenagh electoral division was transferred to the Nenagh Urban Council, questions arose as to the rights and liabilities of the two councils; and on the 12th December, 1900, an agreement was entered into between the rural district and the urban district whereby it was agreed to refer the same to John J. Clancy, Esq., Barrister-at-law, to arbitrate upon and make his award as between the councils with regard to all matters and things concerning which an agreement might have been made by the Councils.

This agreement was on the 12th January, 1901, received and made a rule of Court; and afterwards, acting in pursuance of this agreement, Mr. Clancy awarded—(*a*) That the Nenagh Rural District Council should execute for the consideration thereinafter mentioned a legal transfer of its interest in the nine plots of land and cottages erected thereon, such transfer to take effect as from the 9th April, 1900, at the cost of the Nenagh Urban District Council; (*b*) That the then existing system of management as regards the plots and cottages was to continue to the 1st November, 1901; (*c*) That the Urban District Council was liable to refund to the Rural District Council the Urban District Council's share of five-sixths of the half-yearly instalment of loans payable on the 1st May, 1900, this share to be ascertained by an apportionment of the said five-sixths of the instalments according to rateable value as of the financial years 1899–1900, between the existing Urban District Council and the Rural District Council; that the remaining one-sixth of the said instalments—the instalment due the 1st

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November, 1900; the instalment due the 1st May, 1901; the instalment due the 1st November, 1901, andall other expenses under the Labourers Acts from the 1st May, 1900, to the 1st November, 1901, should be added together; the total revenue received from the said property from the 1st May, 1900, to the 1st November, 1901, including recoverable arrears, and all grants in aid applicable to the said period should be deducted from the total of the expenses, and the Urban District Council should be liable for 3 per cent. of the net loss so ascertained; (*d*) That the Urban District Council and the Rural District Council should ascertain the aggregate of the balances of the Labourers Act loans which would remain due when the half-year's instalment due to 1st November, 1901, had been paid, including the sum of £1500, which had then yet to be received at the date of the inquiry, and any other sums received or receivable for carrying out the several schemes under the Labourers Acts which were finally sanctioned before the creation of the urban district, but less 3 per cent. of the capitalized value of the amount of the Exchequer contribution payable to the County Council for the benefit of the Rural District Council. As a consideration for the transfers the Urban District Council should apply, under the provisions of the Housing of the Working Classes Act, for a loan equal to 3 per cent. of the total of said balances for the purpose of extinguishing an equal amount of the aggregate of the balances. The loans to be paid off should, if the rules of the lending authorities so permitted, be liable to the highest rate of interest; and if such new loan could not be realized, then the Urban Council should be liable for the repayment in the existing manner of 3 per cent. of the aggregate of the said balances, and should make such repayment to the County Council for the account of the Rural District Council, or to the lending authority, on the half-yearly days appointed for the payment of the Labourers Acts loans.

For reasons as to which there was considerable controversy in the affidavits, the nine sites and cottages thereon were not transferred to the Urban District Council; and on the 11th February, 1907, Mr. Cyril E. Browne, the Local Government Board Auditor, entered on the four half-yearly accounts ending 31st March, 1905, 30th September, 1905, 31st March, 1906, and 30th September,

1906, orders by which he struck out and disallowed a payment of £25 2*s.* 6*d.* for each of these half-years, as being the sum paid on account of the repayment of the loan or annuity to the Board of Works upon the nine cottages, and he surcharged Messrs. Laurence Butler, Thomas O'Brien, and Patrick Flannery, for the half-year ending the 31st March, 1905; Thomas M'Soley, Thomas O'Brien, and Thomas King, for the half-year ending 30th September, 1905; Laurence Butler, Thomas Bourke, and John Kennedy, for the half-year ending the 31st March, 1906; and Laurence Butler, Thomas Bourke, and Patrick Bonfield, for the half-year ending 30th September, 1906, being the Rural Councillors who signed the respective paying orders to the Board of Works in discharge of the receivable orders issued by the Board of Works for the entire sum due each half-year for the annuity payable under the Labourers Acts. These four orders of surcharge were identical in terms. The following is the first in order of date:—

Nenagh Rural District Council.—Half-year ended 31*st March*, 1905.

COPY OF SURCHARGE.

Under the terms of an award of Mr. J. J. Clancy, an arbitrator duly appointed under Article 30 of the Schedule to the Application of Enactments Order, 1898, dated 3rd August, 1901, nine cottages were to be transferred to the Urban Council of Nenagh on the 1st November, 1901, the Urban Council becoming liable for a certain proportion of the annuity payable to the Commissioners of Public Works in respect of moneys borrowed under the Labourers Acts. Owing to their own default, the Rural Council have retained possession of the said cottages, and, in direct contravention of the terms of the said award, continue to discharge the said annuity. I consider the payment thereof to be unfounded and illegal, and I hereby strike out and disallow the sum of £25 2*s.* 6*d.*, being the moiety of such annuity paid within the half-year, and I surcharge with the said sum of £25 2*s.* 6*d.* Messrs. Laurence Butler, Thomas O'Brien, and Patrick Flannery, who by their signatures authorized the said illegal and unfounded payments, and I certify the same to be jointly and severally due by them.

(Signed), CYRIL E. BROWNE.

11*th February*, 1907.

On the 14th February, 1907, an order was made by the Rural District Council that copies of the surcharge should be sent to

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Mr. Michael Gleeson, solicitor to the Council, and that he should be requested to appeal to the Local Government Board, or take such steps as he thought fit, to have the surcharge remitted, and also that he should make arrangements for the transfer of the nine cottages to the Urban Council forthwith. The Clerk of the Rural Council reported on the 7th March, 1907, that, so far as he was aware, Mr. Gleeson had not taken any action in the matter, and on the 22nd July, 1907, the Local Government Board received from the clerk a notice of appeal (undated) on behalf of the surcharged councillors against the respective surcharges. The Local Government Board informed the surcharged councillors that the appeal could not be entertained, as the time for appealing had elapsed long before the receipt of their notice of appeal.

On the 7th August, 1907, the surcharged councillors applied for and obtained from Dodd, J., sitting as Vacation Judge, a conditional order for a writ of *certiorari* to remove into the King's Bench Division, for the purpose of being quashed, the disallowance and surcharge made by the auditor, together with the reasons for such disallowances and surcharges, upon the grounds—(1) that they were made without and in excess of jurisdiction; (2) that the moieties of the annuity referred to in the order of surcharge were legally and properly paid by the Council, and in pursuance of a covenant contained in the mortgage and the receivable orders requiring payment thereunder; (3) that the Council were obliged to retain possession of the nine cottages, and to remain liable for the annuity, owing to the refusal of the Urban District Council of Nenagh to take a transfer pursuant to the award, or to apply for a loan under the Housing of the Working Classes Act, and to the non-ascertainment of the proportion of the annuity payable by the Rural and Urban District Councils respectively, and owing to the Urban District Council not having been substituted as borrowers in respect of the loans for the cottages; and (4) that the orders of surcharge were made without and in excess of legal authority.

Cause was shown by Mr. Cyril Browne, the auditor, in an affidavit, in which he referred to a former affidavit in the matter of the King (at the prosecution of James Meagher, Thomas Clenihan, and Edward Gaynor) *v.* himself, and to the several

minutes and other documents therein exhibited or referred to, and he submitted that the facts and circumstances therein appearing as to the negligence and mismanagement shown by Mr. Michael Gleeson in the conduct of the legal business of the Council and their predecessors, the Board of Guardians, in connexion with the Labourers (Ireland) Acts, and the neglect and failure of the Council to provide for the efficient and proper management of their legal affairs, notwithstanding Mr. Gleeson's long-continued inattention thereto, were material to be considered in reference to the surcharges. The correspondence showed, he contended, that the Urban Council expressed their willingness throughout to take over the cottages if sufficient abstract of title were furnished by the Rural Council to enable the solicitor for the Urban Council to prepare the necessary legal transfers. The minutes of the Rural Council for the 7th July, 1903, contained the following resolution relating to the abstract of title:—"That Mr. Gleeson be again requested to furnish the Urban Council with these documents. Owing to these cottages not being transferred, the Council are at a loss of £60 per annum since the 1st November, 1901, the date from which the transfer should have taken place."

On the 24th November, 1907, Mr. Michael Gleeson attended and explained that the delay in transferring the cottages was due to the failure of a Mr. H. S. O'Brien to appoint trustees to receive the compensation awarded for additional allotments to six of the cottages; that within the past few days such trustees had been appointed; that the conveyance had been sent for signature, and that when it was returned he (Mr. Gleeson) would have no difficulty in satisfying the Nenagh Urban District Council as to the title to the plots to be transferred. As a matter of fact, at the time of his making the surcharges, out of twenty deeds which should have been produced as the title-deeds to the sites of the nine cottages, nine were missing altogether, and of the eleven which were produced five were not stamped, two were not dated, and at least nine were not registered, including the conveyance by H. S. O'Brien, which was executed on the 26th day of May, 1905. The minutes of the Nenagh Rural District Council for the 1st February, 1906, contained the following resolution:—"Resolved, That our solicitor, Mr. Gleeson, be informed that the Council are

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astonished at his failure to take steps to have the nine cottages situate within the urban area transferred from them to the Urban Council, in accordance with the award made by Mr. Clancy, B.L., arbitrator, nearly five years ago. The Council have already lost about £300 owing to the failure of not having these cottages transferred. They hope this intolerable state of affairs will not continue much longer, and that something will be done to prevent the ratepayers from losing £60 a year, which should be borne by the Urban Council." Notwithstanding this resolution, no transfer of the said cottages had taken place up to the time of making the surcharges, and he was unable to find that the Rural Council had done anything to compel their solicitor to comply with the terms of their resolution, and to do his duty in the matter. He considered that there was no necessity and no justification for the retention by the Rural Council of the nine cottages, and that the ratepayers of the Rural District should not be saddled with a wholly unnecessary payment. The liability of the Nenagh Rural District Council for the proportion of the annuity payable in respect of the nine cottages to the Commissioners of Public Works should have been long ago transferred to the Urban Council, and he considered that nothing had prevented the transfer of the nine cottages with their liabilities to the Urban Council, pursuant to the award, except gross neglect and inattention in the management of the legal business of the Rural Council; and he also considered that the Rural Council could not justify the retention of these cottages and liabilities, and that their retention was wholly unnecessary, and attributable to the failure and neglect of the Rural Council in not having taken any proper or reasonable measures to transfer the same, as they ought to have done, and could have done, by making provision for the efficient conduct of their legal business, instead of allowing it to remain in the hands of Mr. Gleeson, notwithstanding his long-continued inattention to it, and his disregard of their own resolutions. He submitted he was justified in surcharging the prosecutors herein, as they were the members of the Nenagh Rural District Council who signed the paying orders for the payments, and who had, each of them, been a member of the Council for a considerable period. They were fully aware of the negligent management of the Rural District

Council's legal business by Mr. Gleeson, and of the unnecessary liabilities incident to the retention of the nine cottages by the Rural Council.

On the other hand, Mr. Gleeson contended that the delay in transferring the cottages was due to causes over which he had no control. At the date of the making of Mr. Clancy's award, additional half-acre plots had been added to the nine cottages, and the Rural Council had not completed the investigation of the titles thereto, or obtained conveyance of the plots, especially from the representative of Thomas Riggs Miller of three of the plots, owing to the trustee of the estate being travelling abroad, and afterwards going to reside in New Zealand. By not pressing the Urban Council to take over the cottage until the title was completed, he believed that he was preventing the possibility of costly litigation. Inasmuch as the loan for other cottages as well as the nine was covered by the mortgage to the Board of Works, and the yearly instalments therefore were included in one receivable order, and the liability to pay same could not be evaded or segregated until the Urban Council had been substituted as borrowers, the Rural Council was bound to pay the extra yearly instalments as heretofore, and had done so, up to and ending the 30th September, 1906.

Some further affidavits were filed by Mr. Browne on the one side, and Mr. Gleeson on the other, dealing with the failure to carry out the transfer up to 26th October, 1908, and the responsibility therefor; but the controversy was not material to the points decided by the Court.

D. S. Henry, K.C., and *James O'Connor, K.C.*, for the prosecutors:—

The auditor has stated his reasons on the face of his surcharge. His intention was to make a surcharge under section 12 of the Local Government Act, 1871, and he surcharged the payments as being unfounded and illegal. The payment of the instalments was in respect of an indebtedness legally enforceable against the Council by the Board of Works. Such a payment cannot be described as unfounded or illegal. Section 20 of the Local Government Act, 1902, does not apply to cases like the present.

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Councillors are not "accounting persons" within the meaning of that section, but in any event there was no such negligence proved here as would justify the auditor in acting under this section.

Ronan, K.C., and *Healy, K.C.* (with them *W. G. Gibson*), for the auditor:—

The auditor was justified in holding these payments to be unfounded and illegal. The Rural District should never have been burdened with these payments, and if the prosecutors had done their duty as members of the Council, in securing the transfer of the sites in due time, this liability would never have arisen. The auditor is not restricted to section 12 of the Local Government Act, 1871. The order of surcharge does not purport to be a full statement of his reasons. He was never called upon for a statement of his reasons within the meaning of the section. If he had been called upon to do so, he would have given the reasons set forth in his affidavit showing cause, and which in the absence of a notice calling for his reasons must be treated as his real reasons, viz., negligence and misconduct on the part of prosecutors in not insisting upon the proper steps being taken to relieve the Rural District of this liability. Section 20 of the Local Government Act, 1902, gives the auditor authority to surcharge in such a case. The prosecutors are "accounting persons" within the meaning of the section. See judgments of Gibson and Kenny, JJ., in *The King* (*Kennedy*) v. *Browne* (1); and see also *The King* v. *Carson Roberts* (2).

G. C. Green, K.C. (with him *The Attorney-General* and *Dudley White*), for the Local Government Board:—

The Board is anxious for a decision of the important points raised in this case for the guidance of its auditors.

The following cases were also referred to: *The Queen* v. *Calvert* (3); *The King* v. *Newell* (4); *The King* (*Drury*) v. *Corporation of Dublin* (5).

Cur. adv. vult.

(1) [1907] 2 I. R. 505.
(2) [1908] 1 K. B. 407.
(3) [1898] 2 I. R. 511.
(4) [1903] 2 I. R. 335.
(5) Specially reported and printed in pamphlet form by the L. G. Board.

LORD O'BRIEN, L.C.J.:—

This case was argued at much length, but in the end resolved itself into a somewhat narrow question. It appears that the Rural District Council of Nenagh was divided into two districts, one called by the original name of the Rural District of Nenagh, and the other the Urban District of Nenagh. It is unnecessary to state in detail the history of the division. It was referred to Mr. Clancy, K.C., to adjust the existing liabilities between them. Certain annuities payable in respect of money advanced by the Board of Works for the building of labourers' cottages, and secured by mortgage, were directed by Mr. Clancy's award to be transferred to and paid by the Urban District Council. The cottages were directed to be transferred to the Urban District Council, and the liability in respect of them was to attach to the Urban District Council from June, 1901; but neither cottages, nor the liability for them, was transferred to the Urban District Council before that date, as they should have been. The annuities secured by the mortgage to which I have referred remained payable, legally payable, by the Rural District Council, and, being legally payable, were paid, that is to say, so much as for the time being was due, by the Rural District Council. The three prosecutors authorized payment of the sums in question. The payment so made was disallowed by the Local Government Auditor. I shall read his surcharge. It runs as follows:—"Under the terms of an award of Mr. J. J. Clancy, an arbitrator duly appointed under article 30 of the Schedule to the Application of Enactments Order, 1898, dated the 3rd August, 1901, nine cottages were to be transferred to the Urban Council of Nenagh on the 1st November, 1901, the Urban Council becoming liable for a certain proportion of the annuity payable to the Commissioners of Public Works in respect of moneys borrowed under the Labourers Acts. Owing to their own default, the Rural District Council have retained possession of the said cottages, and, in direct contravention of the terms of the said award, continued to discharge the said annuity. I consider the payment thereof to be unfounded and illegal, and I hereby strike out and disallow the sum of £25 2*s.* 6*d.*, being the moiety of such annuity paid within the half year, and I surcharge with the said sum of £25 2*s.* 6*d.* Messrs. Laurence Butler, Thomas O'Brien, and Patrick Flannery,

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who by their signatures authorized the said illegal and unfounded payment, and I certify the same to be jointly and severally due by them." We have then the ground of the surcharge distinctly stated. Let me repeat the actual words of the auditor :—"I consider the payment thereof to be unfounded and illegal, and I strike out and disallow the sum of £25 2*s.* 6*d.*, being the moiety of such annuity paid within the half year, and I surcharge with the said sum of £25 2*s.* 6*d.* Messrs. Laurence Butler, Thomas O'Brien, and Patrick Flannery, who, by their signatures, authorized the said illegal and unfounded payment." It is plain that the auditor purported to act under the 12th section of the Local Government Act, 1871. In my opinion that section gave him no warrant for what he did. The payments made were neither unfounded nor illegal within the meaning of that section. They were actually made. They were not unfounded in point of fact, and they were not illegal. They were legally enforceable, and the signing of the paying order by the prosecutors surcharged was a mere matter of routine. They were not surcharged by reason of any finding of negligence against them. They were surcharged under the 12th section of the Act of 1871, whereas, if they were liable at all, they were liable by reason of the provisions of the 20th section of the Act of 1902. Indeed, it was under this section that liability was sought to be attached to them.

I asked Mr. Healy what was the negligence of the Rural District Council that the auditor had authority to deal with. He replied negligence in not dismissing Mr. Gleeson. I put the same question to Mr. Ronan. He did not put the matter in precisely the same way. He said the negligence consisted in not procuring with due despatch the transfer of the cottages; but both Mr. Ronan and Mr. Healy rested their contention on negligence, and both appealed to the 20th section of the Act of 1902—a very extensive jurisdiction to suppose to exist in a mere auditor at a mere audit of accounts. I assume for the purpose of this case that the members of a District or County Council can, in such a case as this, be held by an auditor responsible for negligence as accounting persons within the meaning of that section. I am careful to say "I assume"; but what are the words of the 20th section—"At the audit of the accounts of any public body, the auditor shall

charge against the person accounting the amount of any deficiency or loss incurred by his negligence or misconduct." These words clearly point to the establishment of negligence against an individual or individuals. There was no such thing done here. No negligence or misconduct was specifically found against any individual—against any *person accounting*. The individuals here were charged in respect of an alleged unfounded and illegal payment which was, in fact, neither unfounded nor illegal by reason of their signing what was a mere routine order.

In my opinion, whenever an illegal or unfounded payment is made, the remedy is that prescribed by the 12th section of the Act of 1871. But where liability arises from negligence or misconduct within the meaning of the 20th section of the Act of 1902, to attach liability for negligence or misconduct within that section, there ought to be a distinct categorical finding of negligence or misconduct.

We quash the surcharge in each case. Each case depends on the same point. We give no costs to the prosecutors. We think the auditor ought to get his costs. He acted with perfect *bona fides*; and I am sure the energy he displayed will be fraught with public advantage. We think also that the Local Government Board should get their costs. I think it right to state that they acted with propriety in stating through Mr. Green, their counsel, that they wished to have the important general question raised—the question I have dealt with—and that they did not press for a decision as to whether anything could in such a case be made the subject of *certiorari*, except an independent document stating the reasons of the auditor.

I may mention the conditional order which was granted in the case by my brother Dodd was most accurately framed, calling upon the auditor for a return of his surcharge and the reasons for it. Indeed, a return to this effect was substantially made.

One word in conclusion, simply to guard myself. It will be remembered that we do not decide whether in a case like the present the auditor at the audit of accounts has authority to decide that a District or County Council, or the members of these bodies respectively, are or are not guilty of negligence as "accounting persons." This question has not yet been judicially decided, or

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rather I should say, has not as yet been made the exclusively operative ground of decision—liability has not been made to attach by reason of a District or County Council or their respective members being held to be "accounting persons." No doubt my brother Gibson and my brother Kenny expressed an affirmative opinion in their learned and valuable judgments in *Kennedy's Case* (1), but in that case no liability attached, because negligence was not found to exist. So also in the case of *Rex* v. *Carson Roberts* (2). It may be seen with what great caution and reserve I expressed myself in *Kennedy's Case* (1). After referring to Mr. Bourke's argument as to "accounting persons," I am reported to have said, "My brethren are strongly of opinion that, if negligence or misconduct are established, this case would be within the 20th section, and though I have much—very great—misgiving, I am not prepared at present, whatever further argument may do, to formally dissent from their view. However, they agree with me that neither misconduct nor negligence is established, and that on the whole case we must disallow the surcharge, and make absolute the conditional order." This is what I am reported to have said in *Kennedy's Case* (1), even before the very striking judgment of Lord Justice Moulton in *The Carson Roberts Case* (2) had been delivered. The latter judgment appears to me to make it imperative that when a fitting opportunity arises this question should be brought to the Court of Appeal. Indeed, I do not think that any decision hitherto given precludes a Court of first instance from dealing with it—I am not sure that it is not the most important question in local administration.

MADDEN, J. :—

I can state in a few words the grounds of my concurrence with the judgment which has been just delivered. The so-called surcharge of the auditor cannot, in my opinion, be maintained. It is evident from the reasons assigned by the auditor that he intended to found his action upon the powers conferred by the 20th section of the Local Government Act, 1902. But it is also apparent that his surcharge is neither in substance nor in form an

(1) [1907] 2 I. R. 505. (2) [1908] 1 K. B. 407.

adjudication under this section. In form it is an adjudication under the 12th section of the Local Government Act, 1871, because in the very words of the section it declares the payment of the sums surcharged to be unfounded and illegal; and it is so in substance, because the surcharge is made upon the person making the payment, without any judicial or other inquiry as to the culpability of the person surcharged. There is an essential difference between the procedure under one section and the procedure under the other. The liability to surcharge under the 12th section of the Act of 1871 is absolutely independent of culpability on the part of the party surcharged. It depends upon the nature of the particular payment, as being either illegal or unfounded. The person who, by signing a cheque, gives effect to an illegal or unfounded payment, is made responsible and can be surcharged. The 20th section of the Act of 1902 proceeds upon a different basis. The procedure under the former Act is by way of surcharge pure and simple, and this word is properly used in such a case. The procedure under the Act of 1902 is by way of charge and is so expressed. The auditor can "charge against any person accounting the amount of any deficiency or loss incurred by his own negligence or misconduct, or of any sum which ought to have been, but was not, brought into account by him, and shall in any such case certify the amount due from him."

Counsel on behalf of the Local Government Board expressed a hope that the decision in this case might afford to auditors some guidance for their action in the future. I regret to say that, so far as I am individually concerned, I cannot meet that very natural demand; for any observations of mine upon the statute of 1902 would be extra-judicial and of no avail, for the simple reason that the auditor has not taken action under that Act. What the scope and application of the Act of 1902 may be—whether the members of the body whose accounts are being audited, if negligence is proved against them, can individually be made responsible as accounting parties—is a question of great importance. The learned Judges here and in England who have held that this question should be answered in the affirmative, were careful to point out that an adjudication under this section—and that in the corresponding English statutes—must in every instance be

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the result of an inquiry of a judicial character. No such inquiry was held in the present case. It was naturally omitted by the auditor, who thought that he was at liberty to act under the 12th section of the Act of 1871, which does not involve an inquiry as to individual culpability, but merely an inquiry as to the nature and character of the payment in respect of which the surcharge is made.

WRIGHT, J.:—

I concur. The auditor's reasons for his surcharge will be found in paragraph 5 of his affidavit:—"I beg leave to refer to my said affidavit and to the several minutes and other documents therein exhibited or referred to, and I submit that the facts and circumstances therein appearing as to the negligence and mismanagement shown by the said Michael Gleeson in the conduct of the legal business of the Nenagh Rural District Council and their predecessors, the Nenagh Board of Guardians, in connexion with the Labourers (Ireland) Acts, and the neglect and failure of the Nenagh Rural District Council to provide for the efficient and proper management of their legal affairs, notwithstanding Mr. Gleeson's long-continued inattention thereto, are material to be considered in reference to the surcharges which are the subject of these proceedings."

In effect he finds the District Council guilty of negligence. That negligence consists in this, that they took no proper or efficient steps to transfer the nine cottages to the Urban Council, and when they found that their solicitor, Mr. Gleeson, was remiss and procrastinating unreasonably, did not dismiss him, and get some one else to do the legal work. I am far from saying that in coming to this conclusion the auditor was wrong. For that neglect or default of the Board he has penalised certain individual members of the Board. He has declared that the payments made were illegal and unfounded, and he has surcharged the persons who signed the cheques. His surcharge is framed in accordance with the language of section 12 of the Act of 1871 (34 & 35 Vict. c. 109):—"Every auditor . . . . shall examine into the matter of every account which is to be audited by him, and shall disallow and strike out of every such account all payments, charges, and

allowances made by any person and charged upon the funds of any town contrary to law, or which he deems to be unfounded, and shall surcharge the same upon the person making or authorizing the making of the illegal payment, and shall certify the same to be due from such person, and upon application by any party aggrieved shall state in writing at the foot of such account the reasons for his decision."

The payments disallowed by the auditor were made in discharge of a liability of the Council, a default in meeting which could be enforced by legal proceedings, with the additional burden of costs against the Council. The surcharge cannot be sustained under the Act of 1871, under which it is framed. It has been attempted to sustain it under the Act of 1902 (2 Edw. 7, c. 38).

I assume that the persons surcharged were "accounting" persons within the meaning of section 20 of that Act. That is the basis of the decision of the majority of the Judges in *The King* (*Kennedy*) v. *Browne* (1); in the same way it is the basis of the decision of the majority of the Judges forming the English Court of Appeal in *The King* v. *Carson Roberts* (2), and I wish to consider the substance and real meaning of the surcharge, without paying too close regard to the exact form of words used.

Although the surcharge in form purports to be made under section 12 of the Act of 1871, has the auditor in fact condemned these individuals, the prosecutors before the Court, under the powers conferred on him by section 20 of the Act of 1902? It seems to me to be impossible to support the surcharge under this later Act. The auditor has not found that a loss was occasioned to the Rural District Council by the negligence of the individuals surcharged. There are no facts to justify such a finding, if he had so found; and it is to my mind quite clear that the auditor never even considered the question of negligence of individuals resulting in loss to the Board. In truth it is doing violence to language to call these men who simply signed a cheque for payment of interest on a loan from the Board of Works "accounting persons," who have caused a loss to the Council of which they were members.

They are surcharged not for any negligent or improper act,

(1) [1907] 2 I. R. 505. (2) [1908] 1 K. B. 407.

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for what they did was right and proper; and it was a mere accident that they happened to be the persons to sign the cheque or cheques on the several occasions in question. They may be accounting persons, but they most certainly are not accounting persons who by their negligence have caused a loss to the Council.

The auditor has apparently mixed up the two sections, section 12 of the Act of 1871, and section 20 of the Act of 1902; and while I admit that he acted with a *bona fide* desire to rouse the Board into taking some action which would result in a saving to the rates, I am also satisfied that he acted without legal justification, and his surcharge cannot be sustained. To apply the words of Lord Justice Farwell, at p. 440 of *Rex* v. *Roberts* (1)—an auditor "ought in my opinion to consider the facts as a jury would be directed to do in an action of negligence or misconduct where the defendant did not appear, and if such facts are sufficient to justify a verdict against the defendant, then, and then only, should he surcharge. I cannot regard the surcharge as a penalty for neglect or refusal to explain, but as a legal consequence of acts or defaults sufficient to justify a verdict." Here the surcharge is in the nature of a penalty, and a penalty upon persons not found guilty.

DODD, J.:—

The auditor was placed in a position of great embarrassment. The plots for some nine cottages vested in the Rural District Council of Nenagh ought to have been transferred by the Rural District Council to the Urban District Council of Nenagh. If this had been done, as is proved by a resolution of the Rural Council itself, the rates of the Rural District would have been relieved to the extent of some £60 a year. This ought to have been done in 1901. It had not been done at the time of the surcharge. It has not even yet been done. Until it is done the Council is bound to pay to the Commissioners of Public Works in Ireland half-yearly instalments upon a loan for expenses and purchase-money connected with the acquisition of these lands. The auditor fixes the proportion of the half-yearly annuity which

(1) [1908] 1 K. B. 440.

is applicable to these cottages at £25 2*s.* 6*d.* He has surcharged the Councillors who drew the cheques, in which this sum was included, with this amount.

On the face of it, the payment by a District Council of an annuity to the Commissioners of Public Works is neither contrary to law, nor unfounded, using that word in its widest sense so as to include wasteful or extravagant expenditure. The auditor says it is illegal and unfounded for this reason:—The continuance of this burden on the rates is due to the default of the Council. He had pointed out at each audit the startling delay. He had drawn attention to it, without result, and, in despair of any other way of having the matter remedied, he acted in the way now challenged. He justifies his action by calling in aid the 20th section of the Act of 1902, by which an auditor is empowered to charge an accounting party with negligence or misconduct. He says the Council as such has been guilty of negligence, and he takes the individual members who signed the warrants for payment of the entire half-yearly instalments that included this sum of £25 2*s.* 6*d.*, and he makes those individuals responsible for the collective negligence of the Council as a body.

The auditor in exercising jurisdiction under section 20 undoubtedly is a judge. Though he is not to be limited by strict rules of procedure, he ought to give that which rules of procedure are intended to provide—ample intimation of the definite breach of duty with which the individual is charged, and sufficient opportunity to vindicate himself from the charge. If the auditor in this case had formulated a charge against the individuals he has surcharged, each of the accused might or might not have had an answer.

The Council was in a position of almost as great embarrassment as the auditor.

The situation was not of their making. They got over this burden from a previous Board. They also got over the solicitor who had taken the initial proceedings. Mr. Healy says there has been delay from 1886. Short of actually dismissing the solicitor, the Council did everything they could to get the duty of having these cottages transferred to the Urban District Council carried

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out. The auditor exhausted remonstrance with the Council. The Council exhausted remonstrance with their solicitor. The work was not a work that could be done save through a solicitor. The embarrassment has been caused to auditor and Council alike by the deplorable inactivity of the solicitor, with reference to which I shall not say another word, as he is not formally before the Court.

I may, however, perhaps, be pardoned if I preserve here what may give a value and interest to my judgment which of itself it would lack. I refer to Mr. Healy's answer to the question of the Lord Chief Justice:—"What kind of a man would you say, Mr. Healy, this solicitor was?" The reply was as prompt as it was bright—"The kind of man, my Lord, that when the last trumpet sounds would wake up and mutter, 'Second calling.'"

There was not any definite accusation of negligence against those now surcharged. What is really urged is that each of them might have taken some definite action in the Council to have the solicitor dismissed. But the Council might say, Would his dismissal have brought us nearer to the perfection of the title and the completion of the assignment? Would an action at law against the solicitor, if dismissed, have found the missing papers, or brought order out of chaos? Or they might say, We acted as discreetly as we could, and for our action as councillors, or the deliberations of the Council, we are not answerable to the auditor. That might or might not be a good plea. I content myself with saying it has not yet, so far as I can find, been decided to be bad. And the individual councillor also might have made a case to exempt him from liability on grounds peculiar to himself. Or he might possibly have raised a defence, the validity of which also, I think, has not yet been decided—"Granted that I am 'an accounting party,' I am only responsible for *my* negligence, and am not answerable to the auditor for the inaction, even the negligent inaction, of the body of which I am only an individual member."

But there was no charge ever formulated against these defendants—if I may so call them. There was no trial, no evidence, no adjudication. The auditor has not really put in force the provisions of section 20. If we take the analogy of the action of law referred to by Lord Justice Farwell in the concluding words of his judgment, quoted by Mr. Justice Wright, there were here no

writ, no pleadings, no interrogatories so much favoured by counsel at present, no trial, no verdict; there was an assessment of damages but no judgment. This is not a mere question of procedure. It is a matter going to the root of the jurisdiction—to the essential justice of the case. What the auditor has done is to surcharge against the persons making it the payment of these half-yearly sums of £25 2*s.* 6*d.*, as a payment "contrary to law and unfounded," under section 12 of the Act of 1871. I think he has acted on an "erroneous" principle in so doing. With the best motive he has gone astray, and the surcharge so made cannot be sustained. How erroneous the principle, how calamitous, is made manifest by the result—a result which might have been anticipated. No member of Council will now sign cheques, lest he in turn should be surcharged, and the instalments are accordingly in arrear. The embarrassment of the Council has become bewilderment.

I have said thus much for the purpose of indicating what is not decided, rather than what is decided, in this case. Any moot point as to the general authority or jurisdiction of the auditor that was moot before remains moot still. The facts of this case do not afford the basis for laying down those general lines for the guidance of auditors that counsel for the Local Government Board invited us to indicate. We must be careful not to overstep our own functions.

Solicitor for the prosecutors: *Valentine Kilbride.*
Solicitors for the auditor: *D. & T. Fitzgerald.*
Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

J. L.

K. B. Div. 1908. Nov. 23. *Appeal.* 1909. Jan. 26, 27.

THE KING (GUARDIANS OF THE POOR OF THE CASTLEREA UNION) *v.* THE LOCAL GOVERNMENT BOARD FOR IRELAND (1).

Poor Law—Alteration of dispensary districts—Medical Charities Act, 1851 (14 & 15 *Vict. c.* 68), *sect.* 6—*Local Government Board—Requisition to Guardians—Sealed order*—Certiorari—*Discretion of Court.*

Although it is a condition precedent to the power of the Local Government Board to make a sealed order for the alteration of the existing dispensary districts of a poor law union that they should first require the Guardians to alter such districts, subject to the approval or disapproval of the Board, and that the Board should either disapprove of the alteration proposed by the Guardians, or that the Guardians should neglect to make any alteration when required, such requisition need not be in any particular form, and any formal defect in it may be waived by the conduct of the Guardians. To found the jurisdiction of the Board to alter the districts by sealed order, it is sufficient if what, under all the circumstances of the particular case, is a substantial requisition to the Guardians to do so has, in fact, been first made.

A Poor Law Union consisted of four dispensary districts, A, B, C, and D. Both the Guardians and the Local Government Board were in agreement that some alteration should be made, and an inquiry was held by an inspector of the Board, at which several Guardians and others gave evidence, and propounded their views as to the most suitable plan of re-arrangement. The Guardians, on the 25th April, 1908, passed a resolution that five dispensary doctors would be necessary, but that they would only agree to the appointment of the extra doctor on condition that two electoral divisions specified in the resolution, one in B and the other in C, should be made the centres of two re-arranged districts.

The Local Government Board, on the 29th May, wrote a lengthy letter to the Guardians, discussing the various plans put forward, approving of the appointment of the fifth doctor and of the centres, as proposed by the Guardians' resolution. The letter concluded—"In pursuance of section 6 of the Act 14 & 15 Vict. c. 68, the Board have now formally to require the Guardians to alter the A, B, and C dispensary districts, and to form instead four new dispensary districts, as follows—B, C, E, and F," specifying the electoral divisions of which each was for the future to consist.

(1) In the King's Bench Division, before Lord O'Brien, L.C.J., and Gibson and Kenny, JJ.

The Guardians, on the 4th July, passed a resolution, stating that they considered that the proposal made by the Local Government Board in regard to the re-arrangement of A dispensary district "is too ridiculous to be for a moment entertained, and they persist in sticking to the resolution of the 25th April last; and when the Local Government Board sanction same, the Guardians will then propound their scheme."

The Local Government Board then, without any further communication, issued a sealed order for re-arrangement of the districts. The order declared that one medical officer and one midwife should be appointed for each district, with qualifications as prescribed by any sealed order for the time being in force, provided that the medical officer or midwife holding office in three of the existing districts should respectively continue to hold such office for three of the new districts, as specified in the order.

On application by the Guardians for a *certiorari* to quash the sealed order:—

Held, by the Court of Appeal, affirming the judgment of the King's Bench Division, that the sealed order was valid; that the letter of the 29th May was a sufficient requisition to the Guardians, under the 6th section of the Medical Charities Act, 1851, to alter the districts; and that, notwithstanding the imperative language in the concluding part of the order, it was open to the Guardians to formulate an alternative scheme, and that the resolution of the 4th July was, in substance, a refusal by the Guardians to do so, which had the effect of waiving any informality in the requisition, and the necessity of making any further requisition; further, that the provision as to medical officers and midwives did not invalidate the order.

Per Gibson, J.: The provision, if in itself bad, was severable.

Per Kenny, J.: The provision was redundant and superfluous.

The alteration of dispensary districts does not affect the status of medical officers attached to the district before alteration.

Held, also, by the King's Bench Division, that the Court, in its discretion, should refuse *certiorari* under the circumstances of the case.

APPLICATION on behalf of the prosecutors, the Guardians of the Castlerea Union, to make absolute a conditional order for a *certiorari* to bring up for the purpose of being quashed a sealed order of the Local Government Board, dated the 18th September, 1908, re-dividing the dispensary districts of the Union, notwithstanding cause shown on behalf of the Local Government Board by the affidavit of their secretary, Mr. A. R. Barlas.

The conditional order, dated the 13th October, 1908, was granted on the affidavit of Mr. P. A. Flanagan, Clerk of the

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Board of Guardians. The material facts of the case were not in dispute, and were as follows:—

On the 8th and 9th April, 1908, an inquiry was held by Sir Acheson M'Cullagh, Inspector of the Local Government Board, into the local medical relief arrangements of the district, at which a considerable amount of evidence was given by the Guardians and other persons. On the 29th May, 1908, the Local Government Board wrote to the Guardians, enclosing a minute of the evidence taken at the inquiry. At that time there were four dispensary districts in the Union, viz., Ballaghadereen, Castleplunket, Castlerea, and Frenchpark. The letter of the 29th May, after adverting to the fact that Dr. M'Dermott, medical officer of Ballaghadereen district, had resigned, and that the attention of the Board had been attracted to the large size and population of that district, as also of the Castlerea district, and that these might be reconstituted with or without an addition to the medical staff, proceeded to state that at the inquiry two schemes had been put forward, one continuing the existing number of medical officers at four, the other increasing them to five. The letter then mentioned a scheme for redistribution put forward by one of the Guardians, Mr. M. H. Grogan, viz.:—

(1) That the Castleplunket district should be enlarged by transferring to it the Baslick electoral division from Frenchpark district.

(2) That Castlerea district should be reduced to one-half its existing size, the medical officer, Dr. Donnellan, continuing to reside at Castlerea.

(3) That a new dispensary district be formed, consisting of three divisions from Castlerea and two from Ballaghadereen, the medical officer to reside at Ballinlough.

(4) That the Ballaghadereen dispensary district should consist of three of the divisions hitherto comprised in it.

(5) That the Frenchpark dispensary district should remain constituted as theretofore, less by Baslick transferred to Castleplunket.

A map showing these proposed dispensary districts was enclosed, and the letter after referring to a resolution of the Guardians, dated 25th April, 1908, approving of the appointment of a fifth doctor,

but only on condition that Loughlinn and Ballinlough be made the centres of the re-arranged districts, expressed the sanction of the Local Government Board to the creation of an additional medical officership, and to the towns of Castlerea, Ballinlough, Loughlinn, Ballaghadereen, and Frenchpark being the head-quarters of the five medical officers; but that, as Dr. Donnellan had hitherto resided at Castlerea, he should not be required, during his term of office, to change his residence to Ballinlough, unless the Guardians considered it necessary in the interests of the sick poor that he should do so; but that on the appointment of a new medical officer for Ballinlough such officer should be required to reside there. The salaries of the incoming medical officers of the new Ballaghadereen and Loughlinn dispensary districts to be fixed by the Guardians in the usual way after notice, the Board expressing their willingness to consider any suggestions of the Guardians as to the salaries to be fixed by the Board for Doctors Donnellan and O'Donohoe for their reconstructed districts. In dealing with this they should bear in mind Dr. Donnellan's long and good service in the Union, and that he would lose in registration and vaccination fees by the abstraction of the Castlerea division from his district; and that Dr. O'Donohoe would have increased work, had also long and good service in the Union, and should, therefore, receive a suitable increase of salary.

The letter concluded as follows:—

"In pursuance of section 6 of the Act 14 & 15 Vict. c. 68, the Board have now formally to require the Guardians to alter the Castleplunket, Castlerea, and Ballaghadereen dispensary districts, and to form instead four new dispensary districts, as follows:—

"(1) The Castleplunket Dispensary District, consisting of the Ballintober, Carrowduff, Castleplunket, Castlerea, and Castlesheen electoral divisions: area, 38,462 acres; population, 5181.

"(2) The Ballinlough Dispensary District, consisting of the Ballinlough, Cloonfower, Coolougher, and Kiltullagh electoral divisions: area 41,116 acres; population, 8857.

"(3) The Ballaghadereen Dispensary District, consisting of the Ballaghadereen and Edmondstown electoral divisions: area, 19,172 acres; population, 6005.

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"(4). The Loughlinn Dispensary District, consisting of the Artagh North and Artagh South and Loughlinn electoral divisions: area, 26,530 acres; population, 6505.

"A special meeting of the Guardians should be summoned to deal with this very important matter. A map of the new dispensary districts is annexed."

The Guardians held a meeting on the 4th July, 1908, when the following resolution was passed:—

"That having carefully considered the letter of the Local Government Board, dated 29th May last, *re* the constitution of the dispensary districts of the Union, the Guardians consider that the proposal made by the Local Government Board in regard to the arrangement of the Castlerea dispensary district is too ridiculous to be for a moment entertained, and they persist in sticking to the resolution of 25th April last; and when the Local Government Board sanction same, the Guardians will then propound their scheme for the better attendance on the sick poor in the several dispensary districts of the Union."

Nothing further occurred until, on the 18th September, the Local Government Board issued a sealed order in the following terms:—

THE LOCAL GOVERNMENT BOARD FOR IRELAND.

CASTLEREA UNION.

To the Guardians of the Poor of the Castlerea Union, and to all others whom it may concern.

WHEREAS, under the provisions of section 6 of the Poor Relief (Ireland) Act, 1851, the Castlerea Union has been divided into dispensary districts, whereof one such district is named the Castleplunket dispensary district, and now consists of the district electoral divisions of Ballintober, Carrowduff, Castleplunket, and Castlesheen; another such district is named the Castlerea dispensary district, and now consists of the district electoral divisions of Ballinlough, Castlerea, Cloonfower, Coolougher, and Kiltullagh; and another such district is named the Ballaghadereen dispensary district, and now consists of the district electoral divisions of Artagh North, Artagh South, Ballaghadereen, Edmondstown, and Loughlinn:

And whereas, the Guardians of the Poor of the Castlerea Union have neglected to alter the said existing Castleplunket, Castlerea, and Ballaghadereen dispensary districts, when required by us, the Local Government Board for Ireland:

Now, therefore, we, the Local Government Board for Ireland, in exercise of the powers given to us by section 6 of the Poor Relief (Ireland) Act, 1851, and of all other powers enabling us in this behalf, do hereby declare and order that on and after the 1st day of October, 1908, the said existing Castleplunket, Castlerea, and Ballaghadereen dispensary districts should be altered in manner following, that is to say—

(1) The Castleplunket dispensary district shall consist of the district electoral divisions of Ballintober, Carrowduff, Castleplunket, Castlerea, and Castlesheen.

(2) The Castlerea dispensary district shall be called the Ballinlough dispensary district, and shall consist of the district electoral divisions of Ballinlough, Cloonfower, Coolougher, and Kiltullagh.

(3) The Ballaghadereen dispensary district shall consist of the district electoral divisions of Ballaghadereen and Edmondstown.

(4) Another dispensary district, which shall be called the Loughlinn dispensary district, shall be constituted, and shall consist of the district electoral divisions of Artagh North, Artagh South, and Loughlinn.

And we do hereby further declare that one medical officer and one midwife shall be appointed for the service of each of the said four dispensary districts, and that the qualifications of each such medical officer and of each such midwife, respectively, shall be those prescribed by any General Order under our seal for the time being in force; provided that every person holding the office of medical officer or midwife in and for the said existing Castleplunket, Castlerea, or Ballaghadereen dispensary district on the day before the commencement of this order shall respectively continue in and hold such office in and for the Castleplunket, Ballinlough, or Ballaghadereen dispensary district, as constituted by this order, in like manner as if he or she, respectively, were appointed for such dispensary district so constituted.

Given under our seal this 18th day of September, in the year of our Lord one thousand nine hundred and eight.

H. A. ROBINSON.
W. L. MICKS.

Clancy, K.C., and *Philip A. O'C. White*, for the Guardians.

The Solicitor-General (*Redmond J. Barry, K.C.*) and *W. Wylie*, for the Local Government Board.

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LORD O'BRIEN, L.C.J.:—

This case is comprised in a narrow compass. It arises under the 6th section of the Medical Charities Act. The question is, having regard to that section, and under all the circumstances and facts of the case, should a certain sealed order made by the Local Government Board be set aside? The sealed order which is impugned is dated the 18th September, 1908, and is right upon its face. It provides that certain dispensary districts in the county Mayo shall be altered as therein indicated, and that certain medical officers and midwives who were appointed should continue in office. The sealed order did not purport to appoint either doctor or midwife, but said that those already appointed for the districts which were named should continue to hold their appointments—what took place was a modification to a certain extent, a redistribution of area.

Now it has been argued with much vigour by Mr. Clancy, who appeared for the Guardians, that the Local Government Board disregarded the requirements of the 6th section of the Medical Charities Act, 1851, in this way: that they made a certain mandatory order calling upon the Guardians in imperative terms to re-arrange the districts in a certain specified way, without giving to the Guardians in the first instance that discretion as to re-arrangement which the 6th section of the Medical Charities Act contemplated. Mr. Clancy says that the Local Government Board cannot say to the Guardians in the first instance, do this and nothing else; but that they must say to the Guardians—Submit to us a scheme of re-arrangement and we will consider it, and if we do not approve, we can then imperatively prescribe. I think it is clear that the section contemplates that an appeal should be made in the first instance to the discretion of the Guardians—they were to submit their scheme of re-arrangement, and the Local Government Board were to say whether they would have it or not. If the Local Government Board did not approve of the submitted scheme, they had themselves absolute authority to frame a scheme. Now, in the present case, there is no doubt that the Guardians did not submit a scheme formally complete; but it is equally free from doubt that they informed the Local Government Board what scheme they wanted, and that

they stated in emphatic language they could approve of or frame nothing else. This, I think, is plain from the resolutions of the 25th April and 4th July, and all the facts of the case. Here, they in effect said, is the exercise of our discretion. This and nothing else. The matter had been exhaustively treated both by local inquiry and correspondence.

It is said that the Local Government Board assumed an arrogant tone. I can see no arrogance—they appear to me to have been what they ought to have been, courteous and ready to confer with the Guardians.

Assuming that the Local Government Board in their sealed order did not give to the Guardians all they substantially required, I think that the Guardians waived their right to have a formal application made to them in a formal manner to submit a scheme formally complete in all its details. Under the circumstances it would be useless to do it. Both Guardians and Local Government Board had declared what they respectively required. The exercise of discretion had definitely and definitively taken place, and the object of the Act of Parliament had been effectuated. The will of the Guardians had been clearly and definitively ascertained. In substance that upon which the jurisdiction of the Board depended, the condition precedent to jurisdiction, existed. The Act of Parliament says that the Local Government Board shall require the Guardians to frame a scheme. It does not say the requisition shall be in any particular manner. The Guardians practically refused to frame a scheme because they said, in substance if not in so many words, we will not frame a scheme unless you beforehand approve of our view. The Guardians by what they did and said dispensed the Local Government Board from the necessity of formally requiring them to present a scheme formally complete; in fact, they made no objection at all to the letter of the 29th May on the ground that it was a bad requisition. They in effect acquiesced in its substantial sufficiency as a requisition, and subsequently quarrelled only with the suggested mode of alteration; and is it to be said that under these circumstances the Local Government Board has no jurisdiction to act in this important matter which concerns the sick poor, and in reference to which delay might involve the most serious consequences?

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But I think we have a discretion in this matter. The granting of a *certiorari* under the circumstances of this case rests in our discretion, and in my opinion is not in this case *ex debito justitiæ*. Would it be the exercise of a well regulated discretion to issue a writ of *certiorari* for the mere purpose of delay, in order that that which has been already done should be done again? Both Guardians and Local Government Board have declared their opinion as to what should be done. As far as I can see the Guardians have got substantially what they wanted; but if they did not get all they wanted, they stated what they wanted. They exercised their discretion, but the paramount discretion lies with the Local Government Board.

I think that, even independently of the other matters to which I have referred, delay alone would in this case warrant us in refusing the motion—the great delay that has taken place and the greater delay that would ensue from the granting of the order. We can never leave out of sight how delay might vitally affect the poor.

As to the second ground of impeachment, namely, that the Local Government Board appointed doctors and midwives, I do not think they did so. Their original appointment remained, though the area for the exercise of duty may be in some instances altered. See *Rex* (*Local Government Board*) v. *Guardians North Dublin Union and Cullen* (1); *Rex* (*Keelan and Carraher*) v. *Local Government Board* (2). Here what the Local Government Board did was simply to declare, *ex abundanti cautelâ*, that those already appointed should continue in office.

GIBSON, J.:—

This application for *certiorari* is based on two grounds. The first is that the notification of May 29th, 1908, to the Guardians to alter districts under section 6 of the Medical Charities Act, 1851, was a nullity; that a valid requisition was a condition precedent to the exercise of the Local Government Board's authority to make a sealed order; that the order of September 18th was therefore bad, and that the Court must quash it. The second objection to

(1) [1902] 2 I. R. 412 (2) 5 New Ir. Jur. Rep. 81.

the sealed order is that it purports to appoint, or rather continue in office, two existing medical officers and nurses. This second point is of small importance, as if this portion of the order was invalid it is severable, and might be quashed without affecting the rest of the order: *R.* v. *Robinson* (1). The substantial question is the first. The regular procedure under section 6 is that the Guardians are to be set in motion by a request, in response to which the Guardians are to make an alteration subject to the approval of the Board. If they make an alteration of which the Board disapprove, or if they neglect to make an alteration, the Board may make an alteration by sealed order. If the sealed order in this case had been made without giving the local authority full opportunity of expressing their views, the case would stand in a very different position. The letter of May 29th followed not only a public inquiry at which eighteen Guardians were examined, but also a resolution of April 25th of the Guardians. The letter of May, it is admitted, gave effect to that resolution. Is it a nullity, because, in addition to a requirement to alter districts, it specifies the then decision of the Board as to the districts to be formed? It is said that the requirement is entire and mandatory, and was not only irregular but invalid as basis for a sealed order. The letter contains an elaborate statement of reasons. If it had indicated merely the opinion of the Board, there would have been no ground of objection, as the Board had plenary authority, and could make any sealed order they thought fit. No decision on the subject has been brought to our attention, and I think that if the requirement contained in the letter was excessive in its terms, it could not be treated as a mere nullity. The Guardians could have acted on it, and proposed districts of their own. They never gave any answer to the Board objecting to the form of the requirement or otherwise, and on July 4th passed a resolution treating the scheme of the Board as ridiculous, and persisting in "sticking to" their resolution of April 25th. Applicants' counsel admit that the arrangement proposed by the Board on May 25th complied with the terms stipulated for on April 25th, and it is not easy therefore to under-

(1) 17 Q. B. 466.

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stand the latter portion of the resolution of July 4th. Nothing further was done by the Guardians in the way of formulating a scheme; and on September 18th the Board made the present sealed order, a copy of which was sent to the Guardians on September 21st, with a covering letter of same date. On September 26th the Guardians, without answering this letter, passed a resolution (in due course transmitted to the Board) that the dispensary districts should be grouped in four instead of five districts, which was quite contrary to what had been resolved on April 25th. The May letter was a *prima facie* decision unless cause was shown to the contrary by the Guardians—a kind of rule *nisi*. I do not think it meant that all opportunity of discussion and consideration was closed. The argumentative tone of the letter seems to indicate this, and the statute was expressly referred to.

The question before us relates to administration affecting the health of the poor. The Court ought not, unless there has been a substantial miscarriage, to quash such an order. If the requirement was wrong in going too far, still it was not void. Why did not the Guardians then object to the form of the requisition? If they had done so, the present dilatory and expensive application would have been probably unnecessary, as the Board could have at once issued a new requisition in a general form, which would have been a good basis for their sealed order. The Guardians' *laches* and delay, the full opportunity of discussion and consideration that was afforded, the conduct of the Guardians, which shows that there is no prospect of their propounding any scheme which the Board could accept, the absence of objection to the form of the requisition at a time when it could have been corrected, the apparent acquiescence in the requisition as a lawful notification, however objectionable in detail, the improbability that, if the order was now quashed, any beneficial result could ensue having regard to the fixed determination of the Guardians as disclosed in their resolutions—all justify the refusal of *certiorari*. In a case of this kind, as the authorities show, even if *certiorari* could be awarded, the Court has a discretion in declining to issue the writ. Delay, conduct, misleading, inutility, are each topics affecting the action of the Court in dealing with an administrative order like the present, affecting as it does the sick poor, made after abun-

dant time for objection and discussion, and apparently not exhibiting error or miscarriage in its details. No authorities on either side were cited in reference to this first objection to the order. I am aware of no case where a requisition like that of May 29th has been treated as void, merely because, after inquiries, it represented the view of the Board in an unduly imperative form. If the letter of May 29th had, after the requisition to alter, added a statement of the division recommended by the Board, it would have been free from any possibility of cavil. Why did the Guardians not object to the requisition as invalid when the mistake, if any, could have been set right at once, and without expense? It is said that the Guardians could not treat the requisition as the basis for a counter-proposal, because the Board had given its final decision. The argument, if valid, means that the requisition once issued was final and incapable of correction without an order of this Court quashing the whole proceedings, when everything would have to begin *de novo* without any greater likelihood of the Board coming to a different conclusion. After all this delay, and the conduct of the Guardians, which affords no prospect of amicable solution, the Court, though the requisition is open to formal objection, ought not to reduce everything to nullity by allowing *certiorari*. The case is one where we have a discretion, and the considerations I have adverted to are such as to justify the exercise of that discretion. No cases in reference to discretion were cited. I may refer to *R.* v. *Bass* (1); *Reg.* v. *Manchester and Leeds Railway Co.* (2); *Reg.* v. *Riall* (3); *Reg.* v. *Newborough* (4); *Nicholson's Case* (5); *Listowel's Case* (6). I am aware of no authority in reference to a case like the present, and the decisions referred to only illustrate the principle.

As to the second point, I do not think that the alteration of the original districts in dimensions affected the status of officials attached to these districts before alteration. At the opening of the case, I understood, this was admitted; but at the end of the argument, Mr. Clancy urged that the tenure

(1) 5 T. R. 251.
(2) 8 A. & E. 413.
(3) 11 Ir. C. L. R. 279.
(4) L. R. 4 Q. B. 585.
(5) [1899] 2 Q. B. at pp. 470, 471.
(6) I. R. 9 C. L. 46.

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of the officers was destroyed by the change, and that new appointments should be made. If this was so, the order as to this part would be illegal. In my opinion, the officials continued, and the order does no more than declare their status. The objection, therefore, fails. If valid, it would only vitiate part of the order, which is severable, and could be quashed without affecting the other portions.

KENNY, J. :—

The main question submitted for our determination is, whether the letter of the Local Government Board of the 29th May, 1908, constitutes a proper requisition to the Guardians under the 6th section of the Medical Charities Act, 1851, to alter the existing Dispensary Districts of Castleplunket, Castlerea, and Ballaghadereen. That section empowered the Poor Law Commissioners (now represented by the Local Government Board), when they saw occasion, to require the Guardians to alter the Dispensary Districts, subject to the approval, by order under Seal, of the Commissioners; and further authorized the Commissioners, in case they disapproved of the Guardians' alterations, or in case of the neglect of the latter to make such alteration when required, to themselves make the alteration by Sealed Order. I am satisfied that before the Local Government Board proceed to effect the alteration themselves the Guardians must be called on to submit their proposal for alteration, and that the right of the Local Government Board to impose their views on the Guardians then arises in one of two events, namely, disapprobation of the Guardians' scheme, or neglect on the latter's part to put forward any scheme. A requisition and neglect to comply are relied on by the Local Government Board. If an adequate requisition within the section has been made, there can be no doubt that there has been not only a failure but an absolute refusal to comply with its terms.

The letter of the 29th May, 1908, purported, on the face of it, to be a requisition under the 6th section. There can be no mistake as to that. It is a lengthy document, setting out in great detail the several suggestions made by different people in connexion with the proposed changes in the districts, and winding up with a

formal requirement to alter. The requisition is expressly stated to be made in pursuance of the 6th section, and, if it stopped there, it would be clearly impossible to suggest that there was any defect in it. But it goes on to, in effect, direct the Guardians to make the alterations in a particular way; and this circumstance has been seized on as a pretext for now calling in question the efficacy of the letter as a requisition within the Act of Parliament. There is no evidence of any sort before us to show that previously to the issuing of the Sealed Order of the 18th September, 1908, this point was ever suggested. The affidavit in support of the application for the *certiorari* raises it for the first time. In the circumstances of this case I entertain no shadow of doubt that the requirement in the letter operated effectually to justify and legalize the subsequent action of the Local Government Board. An inquiry into the subject-matter of the proposed alterations had been exhaustively made by a Local Government Board Inspector—the views of individual Guardians and others had been ascertained—the Guardians, as a body, had passed a resolution in April stating the conditions on which they would assent to the appointment of an additional doctor—these conditions had been assented to by the Local Government Board, and nothing remained unless to re-arrange the districts. I think that the commentary on the object of the section—namely, that the Guardians were intended to be the framers of the scheme of alteration, and that in the ordinary course such scheme should, in the first instance, be carefully considered by the Local Government Board, is true and appropriate. It is clear that an opportunity to formulate such scheme should be given to the Guardians. The requirement in the letter of the 29th May did not preclude them from sending forward their own scheme. When received, the Board might or might not reconsider their own proposal. They were omnipotent in the matter, and need give no reason for their disapproval of the Guardians' scheme. The fact of the Guardians having been called upon, not only to alter, but to alter in a particular way, does not, in my opinion, affect the validity of the requirement in the least. They were referred to the section of the Act of Parliament which showed them that the formulation of a scheme rested with them in the first instance, and that they

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were not bound to adopt any cut and dried scheme of the Local Government Board. They might, perhaps, have resented the action of the Board in assuming to dictate to them, but such attempted dictation could not affect the clear language of the section which constituted the Guardians as the framers of the scheme in the first instance. In my opinion, even apart from the special circumstances of the present case, the requisition was in form and substance good and valid within the section. But, with those circumstances, it seems to me that any possible objection to it disappears.

The subsequent matters confirm me in the conclusion I have arrived at that the requisition is one within the section. The Guardians met on the 4th July, and passed a resolution the bearing of which I do not understand, in which they declared that they "stuck by" their previous resolution in April, and would not consider the scheme of the Board, which they characterized as ridiculous, unless the conditions of that previous resolution were acceded to. As I have said, those conditions had already been acceded to by the Board, so that it is difficult to see what the Guardians were at. One thing is plain to my mind, that they then accepted the requisition as a good one. Why did they not then send forward a proposal of their own, and why did they remain absolutely passive for over two months after that? The Local Government Board was not impetuous. It gave the Guardians ample time to be advised in the matter, and, if they thought right to do so, to formulate a scheme; and it was not until the 18th September that the Sealed Order which is impeached was issued. During all that time the Guardians never suggested that there was any infirmity in the requisition; and, in my judgment, if they were entitled to make an objection to the form of the requisition, they must be regarded as having waived any such objection.

As to the concluding part of the order, confirming the doctors and midwives of the three former dispensary districts in their positions as officials of these districts as altered by the order, I am of opinion that these persons were not by the reconstitution of their districts automatically or otherwise removed. As has been decided by this Court, they accepted office subject to the liability

to alteration of their districts, and I consider that their status as officers of the particular Dispensary Districts remains unaffected by the reconstitution, though their districts and their emoluments might undergo a distinct change. This portion of the order might be regarded as redundant and superfluous.

I concur in thinking that the conditional order should be discharged.

J. G. T.

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The Guardians of the Castlerea Union appealed (1).

Appeal. 1909. Jan. 26, 27.

Healy, K.C., *Clancy*, K.C., and *P. A. O'C. White*, for the appellants:—

The main question here turns on the unrepealed portion of section 6 of the Medical Charities Act, 1851 (14 & 15 Vict. c. 68). Under it the Poor Law Commissioners, now represented by the Local Government Board, were empowered to call on the Guardians to alter the Dispensary Districts; but it was only in case of their disapproval of the alteration proposed by the Guardians, or of the neglect of the Guardians to make such alteration when required, that the Commissioners themselves acquired any power to make the alteration. In this case the Local Government Board did not give the Guardians the opportunity of altering the existing districts, or framing a scheme for that purpose: therefore, the action of the Board in issuing a sealed order was a usurpation of authority and a violation of the law. The letter of the Local Government Board of 29th May was a requisition not simply calling on the Guardians to propose a scheme of re-division, but to adopt a particular scheme formulated by the Board, thus arbitrarily depriving the Guardians of the right of initiative conferred upon them by the statute. The Guardians object to the sealed order, not only on the ground that it takes away their statutory right to propose their own scheme of re-division, subject to the approval of the Local Government

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

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Board, but also on the ground that the scheme of re-division ordered was objectionable in certain respects, as to which the Guardians, from their local knowledge, would be the best judges, and on the ground that it takes away the right conferred on them by statute to nominate medical officers and midwives for the new districts: 14 & 15 Vict. c. 8. How are the existing doctors to be compensated for the increased work or loss of practice caused by the re-division? Are the rates to be burdened with increase of remuneration, or compensation in case of diminished remuneration? Local Government Act, 1898, s. 115 (17), (18). As to the granting of *certiorari* being a matter of discretion, and the principles on which it will be granted, see the judgment of Lord O'Brien, L.C.J., in *The Queen* (*Bridgeman*) v. *Drury* (1), citing *Reg.* v. *Justices of Surrey* (2). There was no delay here in applying for the writ. The sealed order was issued in September, and the Guardians applied on the first day of the next sittings. A valid requisition was a condition precedent to the issue of the sealed order: Maxwell on Statutes, p. 574. Though there is no form prescribed for the requisition, it must be a formal act. It must express the requirement prescribed by the statute.

The Solicitor-General (*Redmond J. Barry, K.C.*) and *W. Wylie*, for the Local Government Board:—

The Board do not claim any right to appoint medical officers; nor does the sealed order in the present case purport to do so. The existing officers did not cease to hold office by reason of the alteration in the boundaries: *R.* (*Keelan and Carraher*) v. *Local Government Board* (3). A medical officer once appointed continues to hold office until he dies, or retires, or is removed for sufficient cause. As to the requisition to re-arrange the districts, it sufficiently complied with the statute. There was nothing arbitrary or capricious on the part of the Local Government Board. The sealed order was not issued until after failure of the Guardians to take any step in the matter, and there was no grievance whatever of which the Guardians could complain.

(1) [1894] 2 I. R. at pp. 499–505. (2) L. R. 5 Q. B. 466.
(3) 5 New Ir. Jur. 81.

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Jan. 27.

THE LORD CHANCELLOR :—

We are all of opinion that the order of the King's Bench must be affirmed. Mr. Clancy is quite right in his first point that jurisdiction must be founded on a requisition to the local authority by the Local Government Board. The first part of section 6 of the Medical Charities Act, 1851, has been repealed, but there remains the portion empowering the Commissioners (now the Local Government Board) to require the Guardians to alter dispensary districts "subject to the approval by order under seal of said Local Government Board, and in case of their disapproval, or of the neglect of the Guardians to make such alteration when required, the said Local Government Board may alter such districts by such an order." It is clear that the condition precedent must be complied with; that a requisition must be served upon the Guardians, and that the latter must refuse or neglect to make an alteration. It is not necessary to use any particular words to constitute a requisition. What we must find is whether on the correspondence and resolutions of the Guardians there exist a requisition and refusal. The letter of the Local Government Board of the 29th May appears to me to be conceived in an excellent spirit, taking the Guardians into their confidence, and giving various directions as to the districts. It is a common case that there should be some alteration in the districts, and the Local Government Board set out the resolution of the Guardians of the 25th April, "that this meeting of the Guardians, representing almost every division of the Union, is of opinion that five dispensary doctors are necessary." The Local Government Board proceeded to say that the most feasible way of forming two Dispensary Districts, with the towns of Castlerea and Ballinlough as centres, would be to add the Castlerea Electoral Division to the present Castleplunket Dispensary District under the charge of Dr. O'Donohoe as medical officer, and to constitute the remainder of the present Castlerea Dispensary District into a new dispensary district, which might be named the Ballinlough Dispensary District, under the charge of Dr. Donnellan. It appears that it was a condition of Dr. Donnellan's appointment in 1885 that he should reside at Ballinlough, but although no formal permission was given, he

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was allowed to live in the town of Castlerea, and the Local Government Board made the suggestion that, having regard to the fact that he had lived there for twenty-three years, they were unwilling to ask him now to reside at Ballinlough. Nothing could be more reasonable or courteous than the letter of the Local Government Board. The letter also said they would be glad to receive any suggestions the Guardians might have to offer as to the salaries of Drs. Donnellan and O'Donohoe, and they asked the Guardians to bear in mind that Dr. Donnellan had long services and that Dr. O'Donohoe would have increased work to perform. The Board in that communication formally required the Guardians to alter the districts and to summon a special meeting to deal with the matter. The answer of the Guardians was, that they considered the proposal of the Local Government Board in regard to the re-arrangement of the Castlerea Dispensary District too ridiculous to be for a moment entertained; that they persisted in adhering to their resolution of the 25th April; and that when the Local Government Board sanctioned same, the Guardians would propound their scheme. Reading all the correspondence, there appears to me a plain requisition on the part of the Local Government Board, and a plain refusal by the Guardians to comply with the requisition: and, if so, the Board had power to make the arrangement themselves.

The second point made by the appellants was that an alteration of the districts involved a cesser of the office of the doctors for the districts which had been altered. That was a wholly untenable proposition, and I rather think that the last persons who would desire to insist on that proposition would be the doctors themselves. The only way the doctors could, under the tenure which they have, cease to hold office, was by death, resignation, or removal by sealed order. None of these changes happened here; and I apprehend it is clear that where a doctor takes office under the provisions of the Medical Charities Act, he takes it subject to all the provisions of that code, and that when an alteration of districts is made by the Local Government Board he takes it subject to any obligation incident to the order which they make. There is no hardship in this case so far as the doctors are concerned. In many

cases, as in the *Ardee Case* (1), additional duties were cast on all the doctors, and they did not complain. Again, a man might be left with no duties at all, and yet he would still have the salary. The material point is here, had the doctors lost their office by reason of the alteration in the districts? It is clear they had not. If they had lost their office, the Guardians would, of course, be the proper persons to make the appointments of their successors. There is no suggestion of any interference with the Guardians in the making of these appointments being contemplated. The order declared that one medical officer and one midwife should be appointed for the service of each of the said four dispensary districts, and that the qualifications of each such medical officer, and of each such midwife respectively, should be those prescribed by any General Order under seal of the Local Government Board for the time being in force. With regard to the proviso in the order, it runs: "Provided that every person holding the office of medical officer or midwife in and for the said existing Castleplunket, Ballinlough, or Ballaghadereen Dispensary District, on the day before the commencement of this order, shall respectively continue in and hold such office in and for the Castleplunket, Ballinlough, or Ballaghadereen Dispensary District, as constituted by this order, in like manner as if he or she respectively were appointed for such dispensary district so constituted." That is put in for the benefit of the existing officers, in order to show that the Board wanted to save the rights of those who were there. We think the judgment of the King's Bench was perfectly right; and we do not think it necessary at all to resort to the well-settled rule that there is a discretion vested in the Court when asked to interfere by *certiorari*. Accordingly, the decision of the King's Bench Division must be affirmed, and this appeal dismissed with costs.

FITZGIBBON, L.J.:—

We must not be understood to throw any doubt upon the necessity that, as a condition precedent to the exercise by the Local Government Board of the power or jurisdiction in question here, there shall have been a requisition by the Board

(1) 5 New Ir. Jur. 81.

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to the Local Guardians, and a neglect by them, to perform their duty, or to exercise their powers, in reference to the alteration of dispensary districts, before the Board can lawfully make an order such as that which the appellants now impeach.

It appears clear to me that the Board was not only not arrogating any original jurisdiction in the present case, but that its action was based on the conduct of the Guardians, as letting in the Board's jurisdiction; furthermore, that the Board thought that its order would as nearly as possible carry out what the Guardians desired, and what, if they had not got into a temper, they would probably have accepted. To understand what was really at issue between the Board and the Guardians, it is important to see how the Castlerea Union was originally divided into dispensary districts. The electoral division is the *minimum* unit of division. The discussion began upon the question whether four doctors were enough, or whether five would be required, to serve the redistributed area. But whether the districts were four or five, there would necessarily be some redistribution of electoral divisions, and how these were to be allocated could not be settled until the number of districts had been first settled. It was curious, so far as the legal argument was concerned, that all the proceedings and discussions down to the resolution of April pointed as well to a redistribution of electoral districts if the number of doctors remained four, as also to the selection of the electoral divisions, which were to form the new district if a fifth were formed. I am satisfied that every Guardian, and everybody connected with the Local Government Board, all through these proceedings and discussions, acted on the assumption that, whether there had been a formal "requisition" or not, there had been the imposition of a duty on the Guardians, or an acceptance of the duty by them, to consider the alteration of the dispensary districts. Sending down the Inspector to hold the inquiry; the attendance of the local people and of the Guardians; the giving of evidence; the proposals of Mr. Grogan and of others—were all steps taken to carry out the redistribution. All these steps were taken with the

acquiescence of the Guardians and of the Board, and on the assumption that a redistribution was in progress. The Board ultimately came to the conclusion that Frenchpark district should remain as it was. That reduced the question to that of three doctors or four for the rest. Nobody could look at the map without seeing the excessive length of the line from the south-west to the north-east of old Castlerea, which meant too great a distance to send for a doctor. The old Ballaghadereen district was too large already, therefore some transfer must be made between Castlerea and Castleplunket. The Guardians passed a resolution to the effect:—"We now agree there shall be four districts besides Frenchpark, and if there are to be four doctors, we insist that the seat of one of them shall be Ballinlough, and of the other Loughlinn."

This was simply a requisition that one doctor should live in Ballinlough, and the other in Loughlinn. The Board, by the long letter of May 29, accepted that suggestion, but said—"Bear in mind, that if you insist upon that now, it will be hard on the existing Medical Officer, who lives in Castlerea." Castlerea was put into Castleplunket, because otherwise the excessive length of the district would continue. At that stage the Local Government Board was dealing with the Guardians as being already engaged in considering the question of boundaries, though until then no formal requisition to consider the details had been sent. This requisition can be none the less good because the letter may have been "too previous" in prescribing the details. It required the Guardians to call a special meeting, and they would have been within their right in saying, "We have considered your scheme of distributing the districts, and we decline to accept it. We submit our scheme of division for your approval." They could then have given their counter proposal, and the reasons for preferring it to the transfer of Castlerea Electoral Division to Castleplunket. But where a person or body, charged with the performance of a public or private duty, once peremptorily refuses to do anything, or demands some impossible or unreasonable condition, the other party is not bound to wait any longer, and may treat it as a breach of contract, or a refusal or a renunciation of duty, by the

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other. I cannot read the Guardians resolution as anything short of refusal. "We will take no further part in the alteration of these boundaries; we will have nothing but an acceptance of our suggestions, your proposal to put Castlerea division into Castleplunket is too ridiculous to be entertained at all." They did not even suggest an alternative, and in my opinion, their refusal to consider the proposal gave jurisdiction to the Board to carry out, by sealed order, the alteration which it thought best. That being so, no more need be said about the validity of the order, so far as the formation of the districts is concerned.

As to the order about the doctors, the Board had to deal with the division of one single district—Ballaghadereen—into two, and with the transfer of a single electoral division—Castlerea—from one district to another. It is obvious that if the transfer of a single electoral division from one district to another has the effect which the appellants contend, no alteration whatever can be made without vacating the position of two doctors at least—either dismissing them, or leaving them still entitled to their emoluments, but no longer bound to do any duty. It would equally follow that when an existing district was cut into two, the existing doctor could no longer be treated as the doctor of either part. It is said that the old Act is repealed: but the provision giving doctors fixity of tenure is still in force. In the *Ardee Case* (1) the order provided that the existing doctors should continue to serve in the altered districts. That applies to the transfer of Castlerea. If one doctor gets an additional electoral division, that does not deprive him of his office; his additional duty can only give him a claim for additional pay. If another doctor has an electoral division taken off his district, it may be that his pay should not be diminished, but he cannot be treated as dismissed. If the Guardians now remove Dr. Donnellan from Castlerea, where he has lived for twenty-three years, it may be that they must compensate him. But the Board has suggested that, for the remainder of his time, the removal to Ballinlough shall not be required. Rejecting the contention that no change in the boundaries of the districts of two doctors can be made with-

(1) 5 New Ir. Jur. 81.

out dismissing or releasing both, the first part of the last clause of the sealed order as regards the new district is perfectly right, because it says only that the doctor and midwife to be appointed must possess the prescribed qualifications; the remaining portion of the clause merely identifies which of the three doctors is to be continued in each of the three altered districts. Frenchpark is not mentioned, because it is unchanged. The Local Government Board was legally right in what it did, and if the Guardians had been less hasty and violent in their language, they could have presented their proposals to the consideration of the Board by way of rejoinder to the letter of May 29, notwithstanding its peremptory terms; but by "mounting the high horse" they let in the jurisdiction of the Local Government Board to make the Sealed Order.

HOLMES, L.J. :—

The Medical Charities Act provides that the Local Government Board should have authority to require the Guardians to alter the dispensary districts within their jurisdiction. In this particular case there had been an interchange of views in reference to the question of an alteration of that character, and the Guardians having intimated that they were desirous of having an alteration made, the Local Government Board sent down an Inspector to hold an investigation into the facts, and collect information. At this inquiry, which lasted for two days, a great many Guardians were present, and a good deal of information was obtained.

The Local Government Board then took the matter into consideration, and wrote the letter of the 29th May, 1908, stating in a friendly manner their views as to how the alteration could be carried out in a way which, they understood, would meet the views of the Guardians. The greater portion of the letter was a mere interchange of views; but at the end of it the Local Government Board use formal language :—

"In pursuance of section 6 of the Act 14 & 15 Vict. c. 68, the Board have now formally to require the Guardians to alter the Castleplunket, Castlerea, and Ballaghadereen dispensary districts, and to form instead four new dispensary districts, as follows :—

"(1) The Castleplunket Dispensary District, consisting of the

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Ballintober, Carrowduff, Castleplunket, Castlerea, and Castlesheen electoral divisions: area, 38,462 acres; population, 5181.

"(2) The Ballinlough Dispensary District, consisting of the Ballinlough, Cloonfower, Coolougher, and Kiltullagh electoral divisions: area, 41,116 acres; population, 8857.

"(3) The Ballaghadereen Dispensary District, consisting of Ballaghadereen and Edmondstown electoral divisions: area, 19,172 acres; population, 6006.

"(4) The Loughlinn Dispensary District, consisting of the Artagh North, Artagh Sonth, and Loughlinn electoral divisions: area, 26,530 acres; population, 6505.

"A special meeting of the Guardians should be summoned to deal with this very important matter. A map of the new dispensary districts is annexed."

That was a most formal requisition, if formality is necessary. It follows the words of the section, and if the matter stopped there no question could have arisen. Supposing the Guardians objected to the re-arrangement proposed, they might have said—We object to this alteration, but we submit our own scheme; and it would have been in the power of the Local Government Board to say—We approve, or disapprove. Instead of this, the Guardians passed a resolution on the 4th July, positively refusing to comply with the requisition contained in the letter of the Local Government Board.

Under these circumstances the Local Government Board were bound to make the sealed order. That order seems to me to be perfectly clear and perfectly legal, and could not be set aside.

It was their duty, under the Act of Parliament, to name the number of doctors and nurses in each of the districts mentioned in the order, and accordingly they named the number, and as regards the medical officers theretofore holding office, they direct that these officers are to be retained.

I think the order was right and legal.

Solicitors for the prosecutors (appellants): *Farrell, M'Donnell, & Co.*

Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

W. G.

THE KING (CROMMELIN) *v.* O'NEILL (1).

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1908.
Nov. 11, 19, 20, 30.
Dec. 21.

Compulsory purchase—Acquisition of land under Labourers Acts—Jurisdiction of Local Government Board arbitrator—Agreement as to compensation—Labourers Act, 1906, *sections* 5, 6, 31—*Labourers (Ireland) Order*, 1906, *Rule* 60 (1).

Where proceedings are taken by a District Council to acquire lands under the Labourers (Ir.) Act, 1906, s. 6, a valid agreement as to the compensation to be paid and abatements of rent to occupying tenants may be entered into between the Council and all the persons interested in any particular plot of ground proposed to be taken. Such agreement may be entered into at any time before adjudication by the arbitrator, and does not require the sanction of the Local Government Board, under Rule 60 (1) of the Labourers (Ireland) Order, 1906. After such an agreement has been entered into, and the arbitrator is informed of it, he has no jurisdiction to make an award deciding that amounts different from those agreed upon should be paid for compensation or abatement of rent. Rule 60 (1) either does not apply to proceedings under section 6, or is *ultra vires*.

APPEAL by the prosecutors, Maria Henrietta Delacherois Crommelin, Caroline Anna Shaw, and Evelyn Angelique Delacherois Crommelin, from an order of the King's Bench Division (2), refusing their application to make absolute, notwithstanding cause shown, a conditional order obtained by them for a *certiorari* to bring up, for the purpose of being quashed, the award of Patrick J. O'Neill, arbitrator, appointed by the Local Government Board (Ir.), to assess the compensation payable in respect of lands proposed to be compulsorily acquired by the Newtownards Rural District Council so far as same related to five plots of ground, of which the prosecutors were owners, and of which Messrs. Robinson, Kennedy, Punton, Cunningham, and Yeaman were in occupation as tenants. The material facts of the case are stated in the judgment of the Lord Chancellor. It is only necessary to note that it was not until after the close of the arguments that it appeared that the tenants had agreed to the terms offered by the District Council.

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

(2) The judgment of the King's Bench Division, delivered by the Lord Chief Baron, will be found *infra*, p. 397.

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Harrison, *K.C.*, and *W. M. Whitaker*, *K.C.* (with them *Williamson*), for the prosecutors:—

The fallacy in the judgment of the King's Bench Division is treating the agreements as governed solely by the Labourers Act of 1906. It was not disputed that under the prior Acts such an agreement would be perfectly valid, and should be adopted by the arbitrator, even if entered into a few minutes before the case came before him for adjudication. The practice of entering into such agreements was universal, and until this case no doubt was ever cast upon its propriety and legality. Section 10 of the Act of 1906 expressly provides that, save where inconsistent therewith, the Act should be construed as one with the Labourers Acts, 1883–1896, thus incorporating every one of these Acts. The foundation of a scheme of this kind is found in the Act of 1883, sections 4, 6, 7, 8, 12. Section 3 of the Act of 1896 introduces the Housing of the Working Classes Act, 1890; the compulsory sections of the Lands Clauses Acts are to be taken as amended by it, and are to be deemed to form part of the principal Acts, as if therein expressly enacted. Arbitrations are governed by the 2nd Schedule, Articles 5–13. Under Article 7 the amount of compensation is to be fixed by the arbitrator only in disputed cases, *i.e.*, where the compensation has not been made the subject of agreement. Here there was an agreement. It was not a disputed case, and the arbitrator had no jurisdiction to interfere. Rule 60 (1) of the Labourers Order, 1906, was relied on (1), but that rule, if not restricted to cases under section 5 of the Act of 1906, is *ultra vires*. Under section 6 the Local Government Board have, independently of the rule, adequate powers of control. A case falling within section 6 is out of the concluding words of section 5. This is a case of compulsory purchase, but one in which there was no dispute as to price.

(1) Rule 60 (1)—"Any arrangements or negotiations for the purchase of lands, by agreement with the persons interested, shall be subject to, and conditional on, the sanction of the Board being given to the terms of the proposed purchase, and to any loan or expenditure required for the purpose of such purchase."

The Solicitor-General (*Redmond J. Barry, K.C.*) (with him *George C. Green, K.C.*, and *Dudley White*), for the Local Government Board:—

The object of the Act of 1906 was to give the Board a dominating control over expenditure. Before that Act the District Councils had no power to take land without the leave of the Board. Rule 60 covers both sections 5 and 6 of the Act of 1906. Section 5 is plainer in itself, and required no explanatory interpretation. The Board are now contributing 36 per cent. to the purchase (section 17 of the Act of 1906), and they are entitled to be protected against extravagance in price by having the prices ascertained by an independent person, the arbitrator. Suppose the Board agreed to a claim for £50,000, and the Council chose to enter into agreements for £70,000, the Board, except for Rule 60, would be bound. Under article 7 of the schedule to the Housing of the Working Classes Act, the duty of the arbitrator is, where the "compensation has not been made the subject of agreement," to "ascertain in such manner as he thinks most convenient the amount of compensation demanded by the claimant, and the amount which the local authority may be willing to pay; and, after hearing all such parties interested in each disputed case as may appear before him, . . . he shall proceed to decide on the amount of compensation to which he may consider the claimant to be entitled in each case." Was the claim of the prosecutors made the subject of an agreement? I say no, because there was no sanction given by the Local Government Board under Rule 60. There could be no agreement until such sanction was given.

Chambers, K.C. (with him *Dromgoole*), for the arbitrator, submitted that the agreements were, at any rate, defective, as it did not appear that the occupying tenants concurred in them. To constitute a valid agreement, all interests in the land to be taken should be bound. Agreements cannot be made after the arbitrator's appointment: Rule 29 (*b*), (*c*). [He cited *Ex parte Crawford* v. *M'Swiney* (1).]

James Andrews, for the Newtownards Rural District Council.

(1) [1904] 2 I. R. 15.

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Harrison, K.C., in reply :—

The offer accepted by the prosecutors was twenty-seven and a half years' purchase of the abated rents. This would mean of whatever abatement might be made by the arbitrator. If he fixed a different abatement from that originally contemplated, there would still be a contract which might be enforced with compensation. As to Rule 60, it only deals with cases under section 5. But if that be not so, as the only power to make rules is under section 31, which authorizes rules to be made for carrying out the code of Labourers Acts, a rule cannot be supported which is repugnant to the code: *Reg.* v. *Bird*; *Ex parte Needes* (1).

Nov. 30.

The case being listed for judgment, *Harrison, K.C.*, handed in a copy of an affidavit filed by the solicitor for the five occupying tenants, showing that they had agreed to the sums offered by the Council for their respective occupation interests, and the abatements of rent specified, and that the arbitrator had been informed of this before his adjudication. The Court, accordingly, further postponed judgment.

Dec. 1.

THE LORD CHANCELLOR :—

In this case an application has been made to quash an award of an arbitrator appointed by the Local Government Board for the purpose of an improvement scheme under the Labourers Act of 1906, made by the Newtownards Rural District Council. The scheme, which is under section 6 of the Act, proposed that a number of plots should be taken compulsorily, and, amongst others, five plots the property of the prosecutors, all in the hands of tenants.

An order was duly made in respect of this scheme, and it became absolute under the provisions of the 6th section on the 18th October, 1907.

An arbitrator, Mr. O'Neill, the respondent, was appointed on the 30th November; and notice of his appointment was given to the prosecutors on the 12th December.

(1) [1898] 2 Q. B. 340.

The plots of the prosecutors are :—

1.—1A. 2R. 0P. (Robinson, tenant).
2.—0A. 2R. 0P. (Kennedy, tenant).
3.—1A. 2R. 4P. (Punton, tenant).
4.—0A. 1R. 1P. (Cunningham, tenant).
5.—0A. 2R. 2P. (Yeaman, tenant).

On the 5th December, the Rural Council made an offer to the prosecutors for the purchase of the five plots. It was :—

No. 1.—£33 6*s.* 10*d.*, rent to be abated £1 4*s* 3*d.*
No. 2.—£13 15*s.* 0*d.*, rent to be abated 10*s.*
No. 3.—£46 15*s.* 0*d.*, rent to be abated 34*s.*
No. 4.— £6 3*s.* 0*d.*, rent to be abated 4*s.* 6*d.*
No. 5.—£13 15*s.* 0*d.*, rent to be abated 10*s.*

and the prosecutors were given till the 20th December to accept. The gross abatements were £4 2*s.* 9*d.*

On the 17th December, the prosecutors wrote to the Rural Council five letters accepting the offer, stating in each the abatement of rent to be made as a part of the contract.

On the 28th December the arbitrator sent a notice of his appointment to the prosecutors, and asking them to furnish him with particulars of the interests, including the abatement of rent they considered should be made. The prosecutors replied on the 28th December: "We have agreed to twenty-seven and a half years' purchase of the abated rents in all these cases, so there is no necessity to fill up and send you forms." It is obvious this means twenty-seven and a half years' purchase of the abatements mentioned in their acceptance, not twenty-seven and a half years' of any abatement which might be made by the arbitrator.

On the 5th December, 1907, the Rural Council made an offer to each of the five tenants for their interest in the lands proposed to be taken.

Mr. Robinson, £49 3*s.* 2*d.*, rent to be abated £1 4*s.* 3*d.*
Mr. Cunningham, £7 16*s.* 3*d.*, rent to be abated 4*s.* 6*d.*
Mr. Punton, £38 13*s.*, rent to be abated £1 14*s.*
Mr. Kennedy, £13 5*s.*, rent to be abated 10*s.*
Mr. Yeaman, £12 5*s.*, rent to be abated 10*s.*

Robinson accepted their offer in writing on the 11th December, and Punton on the 16th December, and Cunningham on the

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17th December. I do not find any written acceptance in the other two cases, but that in the result was not material.

The arbitrator sat on the 7th January to hear the cases and proceed with the arbitration. There were a number of other cases to be heard, but this appeal is only conversant with the five I have mentioned.

The representative of the prosecutors informed him that the five cases in question were settled as to terms of purchase. At the same time the solicitor for the tenants informed him that they also had agreed to accept the sums offered for their occupation interests and the abatements of rent suggested. This is the result of an affidavit filed for our information since the main argument, and our decision proceeds on this as the result; and the course adopted was to ask the arbitrator to include the cases in the award, adopting the figures. The arbitrator declined to include in his award the agreed figures, and stated in effect that if the cases were the subject of agreement, the sanction of the Local Government Board should be had, and if he was to make an award on the cases he should have evidence of value; and he adjourned the inquiry to the 15th January, and on that day it was again adjourned to the 30th January, on which day the parties attended and witnesses were examined for the prosecutors and Rural Council. Evidence was given on behalf of the prosecutors that the value was thirty years' purchase.

I do not think that what took place amounted to any waiver on the part of the prosecutors of their rights, whatever they were. As the result of the hearing, the arbitrator made his award on the 19th March, 1908, by which he assessed the value of the prosecutors' interest at a sum less in each of the five cases than was mentioned in the letters. But he altered the abatements for rent in each case but one, reducing them by a total of 7*s.* 3*d.*, which, of course, would become a factor in the figures they accepted of twenty-seven and a half years' purchase of the abated rent, if this is a question to be considered. And he also altered the figures in the cases of the agreed for occupation interest, making them something less in each case, except Yeaman's case, in which he raised it by 5*s.* But here again the alteration of the abatements for rent made by him comes in as a factor.

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But all this does not affect the question of principle on the Act of 1906 which we have to consider.

The arbitrator, in his affidavit by way of cause, has relied on several grounds of opposition to the prosecutor's motion; but, passing over points which are clearly not sustainable, and were not pressed before us, the main contention was, that once it appeared there was an agreement to fix the price the provisions of the Labourers Act of 1906, and Rule 60 framed under it, made the previous sanction of the Local Government Board to the agreed terms a condition precedent to its being binding, though this would not have been so under the other Acts constituting the Labourers' Cottages Code from 1883 to 1906.

It was a matter of common practice down to 1906, before an arbitrator, to state a sum had been agreed on, and ask him to include this in his award as arrived at by agreement. It ceased to be a disputed case then. But the basis of the judgment in the King's Bench Division, that this is all altered by the Act of 1906, and the ground of the Chief Baron's judgment, as I understand it, is that there was no jurisdiction in the Local Authority to enter into an agreement for the purchase of the lands, or fix the price of them, so as to take them out of the authority of the arbitrator to ascertain their value, once they were included in a scheme under clause 6, for taking the lands compulsorily.

He bases that view on the provisions of the 5th and 6th sections; and as in the 5th section which applies to a scheme under which no lands are to be taken compulsorily there is a prescribed sanction of the Local Government Board necessary, so, when working under a scheme under section 6, the moment you come to an arrangement for the price it would be an unreasonable construction to say this could be done under a scheme under section 6, without sanction, whereas the same thing if done under section 5 would require the consent of the Local Government Board; and accordingly he held that the Local Authority had no power to enter into any agreement in respect of the purchase of the five plots.

I am unable to follow the reasoning of the Chief Baron beyond the 5th section, which does contain an express provision; and it seems to me that if the pre-existing law and practice were to be

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altered, it would have been by some declaration giving general control to the Local Government Board, following section 6, or in it, and not confining it to section 5.

The effect of the legislation in the Act of 1906 seems to me to be only to divide improvement schemes into two classes for the purpose of saving expense and securing despatch.

The first of these classes is that mentioned in section 5, where no lands are to be taken compulsorily. Such a scheme becomes absolute without confirmation by the Local Government Board, and the Board is not in privity with it; and therefore in this case it was reasonable that a sanction of them should be provided for.

But in section 6, where the lands are to be taken compulsorily, the old procedure is continued, save that it is simplified and expedited, and the inspector who holds the inquiry is put very much in the position the Local Government Board had been in before. The Local Government Board had estimates before them when they arrived at a conclusion to grant compulsory powers, and there are materials which do not exist in the case of section 5, and there seems no reason for saying if it was competent to agree before the arbitrator before, it should not be done after. There is no express provision to the contrary, and the schedule rules to the Act of 1890, which were by the Act of 1896 applied to compulsory taking before the alleged alteration by the Act of 1906, contain nothing inconsistent with it, and it is admitted they did not make a change up to 1906. Rule 60 contains language quite wide enough to apply to a proceeding under the 6th section, as well as section 5; and it was most natural that the arbitrator should say that this rule, made by the authority which had appointed him, precluded him from adopting the agreements put before him; but if Rule 60 goes beyond cases under section 5, I think it is *ultra vires* so far as it goes beyond it.

A rule made under the powers to which these rules are referable cannot abridge a statutory right or create a new one. The test is the true construction of the statute.

Upon the whole I am of opinion, that the award which rejected and ignored the agreement between all the litigants and set up an adjudication which no one sought for, was unauthorized, and must be quashed as regards the five lots in question.

The prosecutors must get their costs of the appeal, and I see no person against whom they can be given, except the arbitrator who has contested the case.

FITZ GIBBON, L.J.: —

In opening his judgment the Lord Chief Baron says:—

> "In my opinion, had the question depended solely on the construction of the entire code of Acts, down to and including the Labourers Act, 1896, the contention of Mr. Harrison and Mr. Whitaker would have been correct; and I think that the only question we have to consider is the effect of the Act of 1906 upon that code."

But the Act of 1906, sect. 35, is in these words:—

> "This Act shall be construed as one with the Labourers (Ireland) Acts, 1883 to 1903, and may be cited with those Acts."

I find that every Labourers Act, except that of 1885, contains a provision that it shall be construed as one with all the preceding Acts; and the Act of 1885, sect. 25, is in these words:—

> "All powers given by this Act shall be in addition to, and not in derogation of, any other powers conferred by any other Act, and such other powers may be exercised in the same manner as if this Act had not been passed."

Therefore, we are forbidden to hold that the Act of 1906 has repealed, or rendered inapplicable, any of the provisions relating to compulsory purchase, enacted by the former Acts, unless they are absolutely inconsistent with some express words of the last Act. I can not come to that conclusion as to the provisions for fixing the compensation for lands taken compulsorily by offer and acceptance.

The Act of 1896, sect. 3 (1), provides that—

> "For the purpose of taking lands compulsorily by purchase under the principal Acts, the provisions of the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement shall be deemed to be amended by the provisions contained in the 2nd schedule of the Housing of the Working Classes Act, 1890, and such provisions shall (subject as by this Act provided) be deemed to form part of the principal Acts, in like manner as if therein expressly enacted."

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As this clause is to be read into the Act of 1906, I can not hold that the schedule in question is impliedly repealed, or in effect abrogated, by that Act, as to schemes under sect. 6. The schedule shows that taking lands compulsorily by purchase "under the Labourers Acts" includes "the purchase and taking of lands otherwise than by agreement" under the Lands Clauses Acts, as amended by the Working Classes Acts, 1890. It provides elaborately (sect. 1) for the acquisition of "all lands proposed to be taken compulsorily" from "all persons interested in such lands as owners, or reputed owners, lessees, or reputed lessees, or occupiers." After the lands have been "scheduled," it provides for ascertaining by arbitration—sect. (7)—the compensation payable by the Local Authority in every case in "which compensation has not been made the subject of agreement."

The arbitrator is directed (section 8), to give notice to the claimants in all "disputed cases"; and finally section 28 provides for the "costs of arbitration," and section 29 empowers the arbitrator, upon request of any party who is a claimant, to certify the amount of the costs properly incurred by such party in relation to the arbitration, but subject *inter alia* to the proviso—

> "(c) No certificate shall be given where the arbitrator has awarded the same or a less sum than has been offered by the local authority in respect of the claim before the appointment of the arbitrator."

Reading that Schedule with the Act of 1906, I can not hold that the provisions for making preliminary offers to claimants, under penalty of costs if they afterwards obtain the same or less sums from the arbitrator, do not still apply to all cases of lands proposed to be "taken compulsorily," which include cases under section 6. How is making *compensation* "the subject of agreement" inconsistent with compulsory purchase? The purchase is none the less compulsory when the owner who is forced to sell accepts the price which the compelling buyer offers to pay, under pressure of forfeiting his costs, if the arbitrator should afterward find the offer to have been sufficient.

The only reason suggested for holding the system which has hitherto prevailed to be inapplicable to schemes under the Act of 1906, section 6, is that a percentage of the price is now contributed

by the State, while the Local Authority had previously been responsible for the whole amount. With all respect, the old motive for economy—the old reason for trusting the Local Authority not to be extravagant—still survives to the extent of 64 per cent. If that Authority could be trusted not to offer too much, when it had to pay £100, how can the fact that it is now to get £34 from the Local Government Board towards the purchase, render the provisions for making an offer, in order to save costs of arbitration, repugnant to the provisions of section 6, or for confining those provisions to proceedings under section 5?

The real difference between this Court and the King's Bench Division is that we hold land to be "taken compulsorily" though an offered price is accepted, whereas the Lord Chief Baron holds that accepting the price offered, though under compulsion to sell, is an "agreement in respect of the purchase of land" which the Local Authority has "no power to enter into," unless in the case of an improvement scheme in which "it is not proposed that any land shall be taken compulsorily." In my opinion, the system of making offers to be refused on peril of costs, is still applicable to all cases where lands are "proposed to be taken otherwise than by agreement"; and these include cases under section 6.

Section 11 further amends the Lands Clauses Acts as amended by the second schedule of the Housing of the Working Classes Act, 1890; but as so amended, the schedule applies "for the purpose of taking land otherwise than by agreement under the Labourers Acts," and it recognizes the power of the Local Authority to offer prices for "lands taken otherwise than by agreement," which expression includes "land taken compulsorily" under section 6.

We were on the point of deciding this case in ignorance of the fact that, in all the cases in question, the compensation offered had been accepted by both landlord and tenants; and although this has now been proved, and the point made by Mr. Chambers, that the price of a partial interest only could not be fixed by agreement, has been displaced, I wish to add a few words upon that matter. It appears to me that if the price of a partial interest was made the subject of agreement, leaving another interest out-

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standing, the agreement could not be more than conditional. The present case supplies proof of this. Each offer made to the landlord was of a fixed sum for a fixed amount of abatement of the rent payable by the tenant. If there had been no agreement with the tenant as to the amount of his compensation *and* abatement, the arbitrator would have had jurisdiction not only to ascertain the compensation in money, but also to fix the amount of the abatement of rent. He actually altered that amount in every case but one, and he reduced the abatement below what landlord tenant and Local Authority had made the basis of offer and acceptance. For example, in the case of S. Robinson, tenant, the agreed compensation for the landlord's interest was £49 3*s.* 2*d.*, the rent to be abated 24*s.* 3*d.* The arbitrator reduced the abatement to 22*s.* 6*d.* Similar reductions were made in other cases. Though the differences are small, the total of them is not insignificant, and if the tenants had not accepted the offers made to them based on the same abatements, specific performance of the agreements between the Local Authority and the landlord could not be equitably enforced, because the full agreed compensation would be payable, though the landlord would remain entitled to receive a larger amount of rent from the tenants than that which he had agreed with the Local Authority to charge, and the tenants compensation awarded by the arbitrator would presumably be larger than it ought to be.

I must say, however, that I think it would be lamentable if we were obliged to hold that no valid or complete agreement can be made by offer and acceptance, which would fix the compensation to be paid for a partial interest (such as a lessor's), unless the price of every other interest was also fixed by agreement. I am not to be understood as holding this to be so. So far as the loss for which the landlord is compensated consists of an abatement of rent, I, as at present advised, see no reason to hold that the Local Authority and the landlord cannot make a valid agreement fixing so many years purchase of the abatement as the compensation. *Id certum est quod certum reddi potest*, and knowing the expense which has hitherto been saved by removing multitudes of cases from arbitration, by agreeing with landlords to compensate them by fixed numbers of years purchase upon the

aggregate amount by which their rentals may be reduced by abatements allowed to tenants whose compensation is fixed by arbitration, I should be sorry to think that the old machinery can not be worked in the old way.

As to Rule 60 of the Labourers (Ireland) Order, 1906, I can only say that in my opinion it is either *ultra vires*, or it must be confined to cases of "purchase of lands by agreement," as distinguished from cases in which land is "taken compulsorily" though the amount of compensation is fixed by offer and acceptance; in other words, it is either void, or it applies only to cases in which "it is not proposed that any land shall be taken compulsorily," *i.e.*, to cases within section 5.

HOLMES, L.J.:—

By the Newtownards Labourers Order, 1907, made under the provisions of the Labourers Acts, the Newtownards Rural District Council was empowered to acquire compulsorily five parcels of land in the occupation of tenants whose landlords are the prosecutors in this matter; and Mr. O'Neill was appointed by the Local Government Board arbitrator to ascertain the compensation payable to the persons interested therein. After his appointment and before the day fixed for his sitting, the Council through their clerk sent letters to the landlords' agents, offering a specified sum for their interest in each of the five parcels and stating the amount by which it was proposed that the rent of each holding should be abated. The letters concluded with a request to be informed before a certain date whether the proposal would be accepted, and with an intimation that if they did not agree, the amount would be fixed by arbitration, and that the landlords would be obliged to pay the costs unless they were awarded more than what was offered.

These proposals were accepted in writing; and although the arbitrator was informed of this when he sat, he insisted on proceeding with the arbitration, with the result that in every case he awarded a smaller sum than that agreed on, and, except in one instance, altered the abatement of rent. The present proceedings have been taken for the purpose of quashing so much of the award as deals with these cases, on the ground that as there was no dis-

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pute as to the compensation to be paid for the landlords' interest, he had no jurisdiction to alter what had been agreed to. It is to be observed that the price named in the documents is arrived at on the basis that the tenants' rents should be abated to the extent specified, but if the tenants had not agreed thereto, it became the duty of the arbitrator to ascertain what the abatement was to be, pursuant to the power conferred on him by Rule 11 of the second schedule to 53 & 54 Vict. c. 70. Therefore in the absence of such agreement by the tenants, I cannot see how the documents could have amounted to agreements binding either party. It is strange that a matter of such vital importance is not referred to either in the affidavit on which the conditional order was given nor in the affidavit in which Mr. O'Neill set forth, as cause against the conditional order, five objections thereto. It does not appear to have been mentioned in the Divisional Court; and although Mr. Chambers, by arguing before us that there could not be an agreement for the purchase of a single interest in the lands where other interests admittedly existed, suggested to our minds the difficulty with which I am dealing, he made no specific mention of it.

The silence regarding a matter so plainly relevant may be explained by the fact that the tenants had also accepted offers made at the same time and in the same form as those agreed to by the landlords. I think that this appears inferentially from the arbitrator's affidavit of cause; and further investigation has shown that concurrently with the letters addressed to the landlords, the clerk of the Council wrote to each of the tenants, offering a sum for his interest, stating the proposed abatement of the rent, intimating that if the offer was not accepted the amount would be fixed by arbitration, and threatening the same consequence as to costs as that contained in the proposals sent to the landlords. Three of the tenants accepted the offer made to them in writing; and all of them through their solicitors informed the arbitrator at his first sitting that they had agreed to the terms offered. We, therefore, have it in the case of the five parcels of land with which these proceedings are conversant, that the amount of compensation to be paid for the interest of both landlord and tenant, and of the abatement of rent, had been settled by agreement between the Rural Council and the other parties interested; and that although the arbitrator

was told of this, he proceeded with the arbitration as if no such settlement had been come to. Expert testimony was given before him that the compensation agreed to was fair and reasonable, and there was no evidence that it exceeded the value of the premises taken, yet in each instance, *ex informatâ conscientiâ*, he awarded a smaller sum. I am not to be understood to say that he was not entitled to do this, if he was at liberty to disregard the agreements; but it suggests that he thought he was acting, not as a Judge between the only parties to the arbitration, but as a valuer or agent for some other authority or individual.

Before considering the important question raised on behalf of the Local Government Board, and the ground of the judgment of the Divisional Court, I have got a few words to say about the cause shown by the arbitrator. He relies on five matters, of which the first and fourth have been abandoned in this Court; and which it is, therefore, unnecessary for me to deal with. They were brought forward in good faith, but they could not, I think, be sustained in law; and, in any case, it has been thought desirable to have the substantial subjects of controversy decided, so as to afford guidance in future cases.

Mr. O'Neill's third point was pressed by Mr. Chambers. It is that even if there might be an agreement as to the amount of compensation before the appointment of the arbitrator, no such agreement can be entered into afterwards. The authority given for this proposition is Rule 29 of the second schedule to the Act of 1890. In my opinion, the portion of this rule relied on leads to the opposite inference. The provision that a claimant will not be allowed costs where the arbitrator has awarded the same or a less sum than has been offered before his appointment, when taken in connexion with Rule 7, seems to imply that if the offer is made at a later stage, its rejection will not carry with it this penalty. Rule 7 provides that, in every case in which compensation is payable under Part I of the Act—that is to say, for lands taken compulsorily—and which compensation has not been made the subject of agreement (in this Act referred to as disputed cases), the arbitrator shall proceed with the arbitration in the manner therein provided. This points to an agreement at any time before the arbitrator begins his work. It is reasonable that an

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offer made at an early stage before the claimant has been put to any expense, and then rejected, should deprive him of costs fruitlessly incurred subsequently; and nothing more is done by Rule 29.

The other grounds for discharging the conditional order relied on by the arbitrator are the same as those urged by the Local Government Board. They amount to the proposition that where under the Labourers Acts a rural authority is given power to acquire land compulsorily, compensation must be fixed by arbitration, and cannot be made the subject of agreement between the rural authority and the persons interested in the land. "The Labourers Acts," as defined by the Labourers (Ireland) Act, 1906, means a number of statutes (seven in all) enacted between the beginning of the year 1883 and the end of 1903, all of which with the Act of 1906 are to be construed as one. The object of this code is to better the condition of labourers in Ireland, by providing them with dwellings free from sanitary defects, and having the conveniences that ought to be found in even the humblest residences. The legislation began with the Labourers (Ireland) Act, 1883, and the changes introduced by the subsequent statutes with which we are concerned in the present case were intended to simplify the machinery by which their object was to be carried out. The Acts down to that of 1906 had the following features in common:— (1) The preparation of what is called an improvement scheme, accompanied by maps, particulars, and estimates, and distinguishing the lands proposed to be taken compulsorily. (2) A petition to the Local Government Board for an order confirming the scheme. (3) In the event of that Board thinking fit to proceed with the case, a local inquiry held under its direction, and by its officer, as to the propriety of confirming the scheme. (4) An order made by the Board, after receiving the report of the officer who has held the public inquiry, confirming the scheme, with such conditions and alterations as the Board may think fit.

When a scheme has been finally confirmed, the local authority can acquire the lands mentioned therein, including the lands that it is authorized to acquire compulsorily. Down to the Act of 1896 (see sect. 3 of the Act of 1896, p. 128, Bolton's Labourers Acts, and sect. 21, Act of 1883) the machinery for fixing the

compensation to be paid for such compulsory acquisition is the Lands Clauses Acts, of which the principal statute in this country is the Railways Act (Ireland), 1851.

The common experience of Irish lawyers is that after an arbitrator has been appointed under that Act the parties may agree as to the amount to be paid at any time before he takes up the case; and I have never heard it suggested that he was at liberty to fix a different sum. The general and most convenient practice has been for him to include the sum in his award, stating that it has been arrived at by agreement; but whether he takes this course or not, he has certainly no authority to oblige parties who with conflicting interests have come to a settlement to enter on an expensive inquiry for the purpose of enabling him to form a wholly independent judgment. By section 3 of the Act of 1896 the provisions of the Lands Clauses Acts, with respect to the taking of lands otherwise than by agreement, are amended by the provisions contained in the second schedule of the Housing of the Working Classes Act, 1890. I can find nothing in that schedule to prevent the parties coming to an agreement any time before the hearing; and I have already referred to one or two of its provisions which lead to a contrary inference.

Rule 4 is, I think, important on this point. It provides that the confirming authority—that is the Local Government Board—is on the application of the local authority to appoint an arbitrator *between it and the persons interested in the scheduled lands* so far as compensation for the same has not been made the subject of agreement. This shows who are to be regarded as the parties to the litigation, and recognizes that they, like the parties to any other lawsuit, may settle the matter in dispute by agreement with each other.

Thus far I understand that I am in complete accord with the Divisional Court, whose decision rests on section 5 of the Act of 1906. Previous thereto, the code dealt with only one kind of improvement scheme in which the lands to be taken compulsorily were distinguished. Such lands, according to my experience, generally included the greater part of the lands required; but whether this were so or not, every scheme was the subject of local inquiry and of confirmation by the Local Government Board.

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Sections 5 and 6 of the Act of 1906 describe two kinds of improvement scheme—one where it is not proposed that any land shall be taken compulsorily; the other where it is proposed that any house accommodation shall be provided or any land taken compulsorily.

In the first-mentioned scheme there is to be no local inquiry, and the scheme is to become absolute without confirmation, subject to the sanction of the Local Government Board to any loan or expenditure required for the purposes of the scheme. Where the scheme is that secondly mentioned the public inquiry is to be held as provided in the previous Acts; and the only difference is that the Inspector appointed by the Local Government Board may, if he thinks proper, make an order confirming the scheme, and is given for this purpose all or any of the powers conferred by the Labourers Acts upon the Board. His order is subject to a prescribed appeal; but if there is no such appeal, or if it is unsuccessful, the order shall stand confirmed. It thus appears that in an improvement scheme under section 6, substantially the same machinery provided by the former statutes exists, somewhat simplified, for ascertaining the propriety of the scheme; and there is no reason for introducing the provisions in the 5th section as to the sanction of the Board to any expenditure. Indeed, if the two sections are read in their ordinary sense, and consecutively, it seems to me obvious that this provision is confined to section 5, of which it forms a part, and to which it is appropriate, while it is intentionally omitted from section 6, which deals with a scheme of a wholly different character. During the argument I asked the question whether if the Board were to think the amounts awarded by the arbitrator were too great, it could refuse to sanction payment. I was given no answer; but I am of opinion that this would be the consequence of importing the last part of section 5 into section 6. We have been pressed with the argument that section 13, relating to grants by the Local Government Board out of public money placed at its disposal, gives it an interest in the amount of compensation which it had not before, and that, therefore, it is reasonable to invest it with greater powers. This may be so; but these greater powers ought not to take, and I believe have not taken, the shape of either authorizing the Board to disregard the award of the arbitrator appointed by itself, or of

enabling such arbitrator to compel the two parties to the arbitration to proceed with a dispute which they have settled by an agreement between themselves. Rule 60 of the Labourers (Ireland) Order, 1906, has been referred to; but it is only necessary for me to say that if this rule is repugnant to the true interpretation of the statutes, it is *ultra vires*. I think, however, that if read in connexion with sections 5 and 6 of the Act, it does not purport to extend the operation of these sections beyond the meaning I have given them (1).

Solicitors for the prosecutors: *H. Wallace & Co.*
Solicitors for Mr. O'Neill: *T. T. Mecredy & Son.*
Solicitors for the Local Government Board: *T. T. Mecredy & Son.*
Solicitor for the Newtownards District Council: *J. M'Kee.*

W. G.

(1) The following is the judgment of the King's Bench Division, delivered by PALLES, C.B., on the 15th June, 1908:—

This case has been very ably argued. During that argument our attention was invited to a complicated code of Acts reaching back as far as the Lands Clauses Act, 1845; but from the assistance we have received from counsel upon both sides during the argument, the question seems to me to be a short and narrow one. In my opinion, had the question depended solely on the construction of the code of Acts down to and including the Labourers Act, 1896, the contention of Mr. Harrison and Mr. Whitaker would have been correct; and I think that the only question we have to consider is the effect of the Act of 1906 upon that code. Is there any power in the local authority, after a scheme which directs that certain specific lands shall be acquired by compulsory purchase has been sanctioned and confirmed, and has thereby acquired the force of an Act of Parliament, to enter into an agreement for the purchase of those lands, or for the fixing of the price of those lands, which will take it out of the authority of the arbitrator under the Act of 1906 to ascertain their value? I have arrived at the conclusion that the local authority has not any such power, and I base that opinion entirely upon the Act of 1906.

I begin with the Housing of the Working Classes Act, 1890, which gave a power to the local authority to purchase lands by agreement, and under certain circumstances to acquire them compulsorily. The Schedule to that Act contains a rather shorter and less expensive scheme for purchase of lands otherwise than by agreement, than that contained in the Lands Clauses Act, 1845, which was then the governing Act in England, and which, as to purchase under the Act of 1890, was modified by the rules contained in the Schedule. There being under that Act power in the local authority, under certain circumstances, to purchase lands by agreement, it is not to be

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wondered at that, whilst the Schedule to that Act provided machinery for compulsory purchase at a price to be fixed by arbitration, it excluded from the authority of the arbitrator cases in which agreements for purchase had been made. In such cases arbitration was unnecessary, there being power to purchase, and an agreement to purchase, which under that power was valid. In such a case nothing remained for arbitration. Such, in my opinion, was the law in relation to purchase of land for labourers' cottages from 1890 down to 1906.

Then I come to the Act of 1906, and I find that by the 5th and 6th sections of that Act an entirely new system is introduced. The 5th deals with an improvement scheme, where lands are not to be taken compulsorily, and it enacts that such a scheme shall become absolute and take effect without confirmation, subject to the sanction of the Local Government Board to any loan or expenditure required for the purpose of the scheme. So that if the machinery of that section is resorted to, and if the lands are to be acquired by agreement, the local authority is not able of itself to fix an absolute price; the Local Government Board is to have a control over expenditure, and the scheme must be sanctioned by it.

The course which has been adopted here is not and could not have been under that 5th section. The 6th section includes such an improvement scheme as the present, in which all the lands are to be acquired compulsorily. It is true that the section would also apply to a scheme in which part only of the lands were to be acquired compulsorily, and the residue was to be the subject of agreement. But the crucial matter here is that that is not the nature of the scheme which we have to consider. This scheme is to acquire all the lands within it compulsorily. It has not been argued, and in my opinion could not have been argued, that the scheme is *ultra vires*; and the order confirming this scheme has the force of an Act of Parliament.

Had the scheme been framed so as to include *in express terms* that which it is contended it includes impliedly, an uncontrolled power to purchase at any price the local authority and the landowner might agree upon, then the sanction of the Local Government Board would have been necessary—a sanction which is not necessary where the scheme is, as here, to take all the lands compulsorily.

This necessity for the sanction of the Local Government Board to refuse to confirm it unless they were satisfied, gives them the power, if indeed it does not throw upon them the obligation, of satisfying themselves, as a condition precedent to confirmation, that the price agreed to be paid for the lands to be purchased by agreement is a reasonable one; and I regard this power as an essential safeguard to the public purse, and I hold that it would be an unreasonable construction of the statute, which would enable so important a thing as the uncontrolled fixing of the amount of the purchase-money to be effected under a scheme under section 6 without the sanction of the Local Government Board, whereas the Legislature has prohibited by section 5 the same thing being done under that section without the consent

of the Local Government Board. This seems to me to be the more clear, because the prohibition under section 5 is express and clear, whilst the opposite construction arises from an involved and laboured interpretation.

My opinion is that it is within the power of the Local Government Board in considering whether they will sanction a scheme for taking some lands compulsorily and other lands by agreement, to take into consideration all questions of expenditure, and to regulate their assent to or dissent from the scheme by the view which they may take of that question.

As far as I can see the local authority under this Act of 1906 has no power to take land, except under a scheme ; and if that land is to be taken by agreement, the consent of the Board is necessary. Therefore, without expressing any opinion as to the rights the parties might have had, had this scheme been of a different form—had it been what during the argument was called "a mixed scheme"—I am of opinion that under this scheme the local authority had no power whatever to enter into any agreement in respect of the purchase of any of the lands comprised in the scheme.

The 11th section has been relied on—a section which, for the purpose of taking land *otherwise than by agreement* under the Labourers Acts, further amends the Lands Clauses Act, as amended by the second schedule to the Housing of the Working Classes Act, 1890 ; but the answer to any argument derived from the 11th section in this particular case, is that its application is limited to "purchase of land otherwise than by agreement," and in this particular case there is no power to purchase, except "otherwise than by agreement," because the scheme, which is confirmed and is equivalent to an Act of Parliament, says that the lands are to be acquired compulsorily.

Upon that short ground I am of opinion that the present application must fail. Practically the sole argument that we were pressed with was that arising under the Schedule to the Act of 1890, and for myself I go fully with the arguments pressed upon us by Mr. Harrison and Mr. Whitaker as to the construction of the rules contained in that schedule. These rules were necessary under that Act, because that Act conferred an express power of purchasing by agreement. They must have their full force and effect under this Act of 1906, upon a scheme to purchase some lands by agreement, and to purchase other lands compulsorily. But in my opinion it has no application to the present scheme. All the Acts referred to, and to a certain extent incorporated in the Act of 1906, must in my opinion be read as subsidiary to, and controlled by, the clear intention which can be gathered from sections 5 and 6 of the latter Act.

We must therefore allow the cause shown against the conditional order.

As to costs, we have three parties before us here. Of these the District Council has caused all this difficulty, and cannot have costs.

The arbitrator, whose conduct was impugned, must have his costs ; but as we ought not to allow more than one set of costs, we cannot give costs to the Local Government Board, although it has most properly appeared.

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THE KING (DEENY) *v.* THE JUSTICES OF COUNTY TYRONE (1).

Justices—Adjournment—Summons for assault—Civil action pending—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict. c.* 93), *s.* 20.

M. was charged on summons before Justices at Petty Sessions with having assaulted B. and C.:—

Held, that the Justices had no power to adjourn the hearing on the ground that a civil action was pending by M. against B. and C. for an alleged assault arising out of the same transaction as that dealt with by the summons.

CERTIORARI AND MANDAMUS.

By a summons issued and served on the 29th September, 1908, in which The King at the prosecution of Head Constable John Deeny, R.I.C. (the prosecutor in the present proceedings), was complainant, Daniel M'Gonnell was summoned to appear before the Justices at Petty Sessions on the hearing of a complaint that on the 19th September, 1908, he did unlawfully assault Sergeant James Conlon and Constable Henry Bradley while in the execution of their duty as peace officers. The summons came on for hearing before the magistrates at Petty Sessions on the 20th October, 1908. Evidence was given that on the 21st September, 1908, a letter was written on behalf of Daniel M'Gonnell by his solicitor, to Sergeant James Conlon and Constable Henry Bradley, threatening them with civil proceedings for assault on the occasion dealt with by the summons, and that prior to the hearing of the summons a writ was issued and served on Conlan and Bradley claiming damages for assault and trespass. M'Gonnell's solicitor applied to the magistrates for an adjournment of the case before them until the civil action should be disposed of, representing that if there was an adjudication by the magistrates, the order made by them would be used at the trial of the action, and might have some prejudicial influence with a jury or other tribunal that tried the

(1) Before LORD O'BRIEN, L.C.J., and MADDEN, WRIGHT, and DODD, JJ.

case. The solicitor for the complainant opposed the adjournment, but the magistrates made an order adjourning the case till the third Tuesday in January, 1909. The resident magistrate in announcing the decision of the magistrates stated that they felt that if they went into the complaint and decided it, their decision might be calculated to prejudicially affect the minds of the jury before whom the case would be heard, that they had regard to the date of the solicitor's letter and the summons, and that they were all agreed that the application for an adjournment was a reasonable one, and that it should be acceded to. Accordingly, the order above referred to was made, and it was further intimated that, if the civil case had not then been decided, there would be a further adjournment.

The prosecutor obtained a conditional order for a writ of *certiorari* to quash the order of adjournment, and for a writ of mandamus directing the Justices to enter continuances and to proceed to hear and determine the case. Cause was shown on behalf of Daniel M'Gonnell.

In an affidavit made by the prosecutor he stated that several days before the letter above referred to of M'Gonnell's solicitor, he had directed that a summons should be issued against M'Gonnell for the assault, and that any delay in issuing the summons was merely due to official routine; and that the issue of the summons had no connexion with the civil action being instituted. That the writ of summons was not issued till the 9th October, 1908, and not served till the 10th October, 1908.

The present application was on behalf of the prosecutor to make the conditional order absolute notwithstanding cause.

The Solicitor-General (*Redmond Barry, K.C.*) (with him *Dudley White*), for the prosecutor :—

Under section 20 of the Petty Sessions Act, 1851, the magistrates have no doubt power in their discretion to adjourn the hearing of a complaint. But their discretion must be exercised on judicial grounds. Where the adjournment amounts to a substantial evasion of their duty, this Court will quash the order of adjournment, and grant a mandamus to compel the magistrates

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to proceed to dispose of the charge: *Rex* (*Mulliner*) v. *Cork Justices* (1). We do not suggest that in the present case the magistrates did not act with perfect *bona fides*; but, however pure their motives, if, in granting the adjournment, they act on extraneous or extra-judicial considerations, this amounts to a declining of jurisdiction, and is ground for a mandamus: *The Queen* v. *Adamson* (2); *Reg.* v. *Evans* (3). In *The King* v. *O'Gorman Mahon* (4) the Court refused to pass sentence for an assault when an action was pending for the same assault. But in that case the pending action was brought by the prosecutor, and not by the defendant in the criminal proceeding. Moreover, the case only shows that the Court will not determine the amount of punishment until it has all the facts before it.

Muldoon, for Daniel M'Gonnell:—

It is not suggested that the magistrates did not act with perfect *bona fides*, and this distinguishes the present case from *Rex* (*Mulliner*) v. *Cork Justices* (1). The English cases of *The Queen* v. *Adamson* (2), and *Reg.* v. *Evans* (3) do not apply, since the Justices in England have not the wide discretionary power of adjournment conferred by section 20 of the Petty Sessions (Ireland) Act, 1851. In the present case the magistrates acted properly in adjourning till the present action was heard: *The Queen* v. *Justices of Co. Cork* (5), *per* O'Brien, J., at p. 104. [He also referred to *Rex* v. *Southampton Justices* (6).]

Jan. 18.

LORD O'BRIEN, L.C.J.:—

This is a case of exceptional importance. On the 29th September, Daniel M'Gonnell was summoned on behalf of the Crown to appear at the Ballygawley Petty Sessions, to answer a charge of having assaulted certain police constables in the execution of their duty. The case came on for hearing on the 20th October, and on that day the solicitor for the defendant, M'Gonnell, applied to the magistrates for an adjournment of the case on the ground

(1) 39 Ir. L. T. R. 117.
(2) 1 Q. B. D. 201.
(3) 54 J. P. 471.
(4) 4 A. & E. 575.
(5) 18 L. R. Ir. 99.
(6) 71 J. P. 332.

that civil proceedings were then pending in the Superior Courts against the constables at the suit of M'Gonnell, and th an adjudication in the criminal case then before them might have some prejudicial effect on the jury or other tribunal that might try the civil case. Notwithstanding the opposition of the solicitor who appeared on behalf of the prosecution, the magistrates adjourned the hearing for some months, stating that if the civil case was not then tried they would grant a further adjournment.

No doubt, as a general rule, magistrates have a discretion to adjourn, under the 20th section of the Petty Sessions Act, indeed, I might say, an inherent power to adjourn; and it is quite plain that in making the order for adjournment in this case the magistrates acted with perfect *bona fides*. No *mala fides*, or improper motive, has been imputed to them. The only question is, whether they exercised their discretion on a wrong, an illegal, ground. If there was a legal ground for the exercise of discretion, we cannot review what they did. It is a question of their discretion, not ours; but the question here is, was the matter upon which they purported to exercise their discretion a legal one, or was it a matter extraneous and extra-judicial to the case before them—that is to say, the criminal case against M'Gonnell? If the ground upon which the magistrates proceeded was extraneous and extra-judicial to the case before them, then they exercised discretion in a wrong, unauthorized, and illegal manner, and must be taken to have declined jurisdiction. If they did this, the *certiorari* and mandamus must issue to compel them to proceed to hear the case. Now then did the magistrates proceed upon an illegal ground? In determining this we must remember that criminal and civil proceedings, even arising out of the same state of facts, are wholly independent proceedings—not merely collateral, which would in itself not justify adjournment, but absolutely in the eye of the law, independent—so much so that if a man was found guilty of a grievous assault, and sentenced to a long term of imprisonment, that man so convicted might, during his imprisonment, bring a civil action, and recover damages against the man who, in the criminal proceeding, swore he was assaulted by the convicted man. A conviction creates no estoppel, nor does the principle of *res judicata* apply;

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nor does the recovery of damages in a civil case create an estoppel. The man who recovered damages in a civil action may be proceeded against criminally at the other side of the Court. There is no legal identity whatever in the civil and criminal proceedings. The eye of the law sees them as things absolutely distinct, and if a Judge was trying a civil case arising out of the same state of facts as had formed the foundation of a conviction in a criminal case, it would be his duty to apprise the jury that civil and criminal proceedings were distinct matters, and that they should not, in the civil case, allow themselves to be influenced by a conviction in the criminal case. And why all this? Because in the criminal case the proceeding is by or on behalf of the King, and in the civil case by or on behalf of a private individual. Prosecutions on behalf of the King, who represents the general community, have for their object the repression of public mischief. A civil proceeding by or on behalf of an individual has for its object redress to the individual for civil injury. Criminal and civil proceedings in their essential character are wholly distinct—one set of proceedings is extraneous to the other. They are respectively extraneous, and to confound their distinctive attributes would be wholly extra-judicial.

What then is the law? There are two cases amongst others which enable us to determine the matter: *The Queen* v. *Adamson* (1), and *Reg.* v. *Evans* (2). In the former case, *The Queen* v. *Adamson* (1), it is laid down by Cockburn, C.J., that if magistrates have acted upon a consideration of something extraneous and extra-judicial which ought not to have influenced their decision, they have in effect declined jurisdiction, and they should be compelled by mandamus to proceed to hear the case and proceed to adjudication. This was the principle upon which the judgment in *The Queen* v. *Adamson* (1) rested. This decision is referred to at some length in *Reg.* v. *Evans* (2), where it was adopted and followed. In the case of *Reg.* v. *Evans* (2) it was decided that where a summons for libel before Justices is issued, the Justices cannot postpone the hearing and adjudication till a pending action arising out of the same state of facts is disposed of. In that case

(1) 1 Q. B. D. 201, at p. 205. (2) 54 J. P. 471.

the facts were no doubt different, but the principle of the decision is applicable to this case. "We think," said Lord Coleridge, "that [the magistrate] has exercised this power of adjournment unreasonably"—the ground of adjournment being the pendency of a civil action in reference to the same facts. Lord Esher is reported in the same case to have said—"I also think that by adjourning the case in this way the magistrate was intending to wait till the trial of the civil action. The only question for us is, whether by this mandamus we ought to require him to proceed, and either commit the person charged with the libel, or to dismiss the summons. If the magistrate has exercised his discretion upon legal grounds, it is well recognized that the Court will not interfere with him merely because they would have exercised the discretion in another way. But if he has exercised his discretion illegally, then the Court will insist that he shall exercise that discretion according to law. The case of *Reg.* v. *Adamson* (1) shows at all events under what circumstances the Court is bound to say that a magistrate has exercised his discretion illegally. Cockburn, C.J., there lays it down that if the magistrates had exercised their discretion on something extraneous or something illegal, it is the same as declining jurisdiction; and if a magistrate declines to exercise his jurisdiction, he must be compelled by mandamus to go on."

The principle of the decision was, that if the magistrates in adjourning were influenced by extraneous and extra-judicial considerations, they were not warranted in adjourning, and in doing so acted illegally. Were the magistrates influenced by extraneous and extra-judicial considerations in this case? I think they were. They adjourned, why? Not for any reason affecting the case before them, but for considerations affecting another pending case quite independent in its legal character. They looked outside the case before them. They unreasonably —extra-judicially—took a criminal case out of its precedence and priority, and subordinated a prosecution, on behalf of the King for a public wrong, to a civil action instituted by a private person for redress to him as an individual. They took into consideration extraneous matter, and in doing so acted extra-

(1) 1 Q. B. D. 201.

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judicially. Therefore, in the words of Cockburn, C.J., they declined jurisdiction, and this being so, the conditional orders for *certiorari* and mandamus must be made absolute. Indeed it would seem to me that the course pursued by the magistrates, if generally adopted, might be fraught with the most perilous results. If a criminal case is to be postponed till a pending civil case is disposed of, the delay in bringing malefactors to justice might be interminable. I ask, should a criminal case await the conclusion of appeals to the Lords or of new trials—and should the criminal trial subsequently proceed in an atmosphere prejudiced by the result of civil proceedings—or should criminal trials await the termination of civil proceedings that may never reach a conclusion, because in some cases no twelve men may come to an agreement, the more especially if a criminal prosecution is pending. Is the accused in a criminal case to get the benefit of his own evidence in a civil case, when he is not eligible as a witness in a criminal case? We know that it will be practically impossible to keep from the jury in a criminal case what took place in a civil case arising out of the same state of facts upon which a criminal prosecution may be founded. Is the defendant in criminal process to get the benefit of a doubt raised by his own evidence which would be inadmissible in a criminal case? The principal reason, if not the exclusive reason, why in a criminal case the accused is entitled to the benefit of a reasonable doubt is, that he is not eligible as a witness in a criminal case. I am, as I have already said, of opinion that the magistrates in adjourning acted on extraneous considerations and extra-judicially, and therefore that the writs of *certiorari* and mandamus should issue; and I think the consequences which might result from the postponement of a criminal trial till civil proceedings were concluded show the danger and impropriety of the course pursued by the magistrates. At the same time, I think it well to repeat that I am satisfied the magistrates acted with the very best motives—no moral blame whatever attaches to them. Indeed the Solicitor-General expressly stated that they were free from all moral culpability whatever. So also said Cockburn, C.J., and Lord Coleridge, C.J., with reference to the action of the magistrates which was reviewed in the cases

before them. Before I conclude I should refer to the case of *The King* v. *O'Gorman Mahon* (1), which was cited by the Solicitor-General. Lord Denman, C.J., said in that case, the Court cannot pass sentence for an assault while an action is pending for the same assault. This, if reported with perfect accuracy, was evidently a rule of practice, and is intelligible. When sentence comes to be passed, the trial is over. The jury have delivered their verdict. The oath of the jury is, to well and truly try and a true verdict give. When the verdict is given, the function of the jury to try is discharged—nothing remains but the sentence; and in measuring the sentence he should pass, the Judge looks all round him: he looks at the past and the future. He regards the state of the country and the antecedents of the prisoner. He can look outside the developments at the trial, and it would appear reasonable in measuring punishment to regard the amount of the damage awarded against the defendant in the civil case. In doing this he does nothing extraneous to the trial, because the trial is over. The Judge looks round him when everything, so to speak, is at large.

MADDEN, J.:—

There is no branch of the administration of our law to which the principle that justice ought not to be delayed is more strictly applicable than to the summary jurisdiction vested in Justices of the Peace. This is so in the interest of the peace of the district generally, as well as of the particular aggrieved persons who may have invoked the summary jurisdiction of the magistrates. While this general principle applies it is evident that circumstances might come under the notice of the magistrates, occurring in the course of the proceedings, or reasonably connected with their judicial action in the case before them, which would render an adjournment necessary or expedient in the interests of the administration of justice. An inherent jurisdiction in this behalf arises from the necessity of the case. But there is express legislation on the subject. The 20th section of the Petty Sessions Act (14 & 15 Vict. c. 93) provides that "whenever either before or during the

(1) 4 A. & E. 575.

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hearing of any complaint it shall appear advisable, the Justices present may, in their discretion, adjourn the hearing of the same to a certain time or place to be then appointed and stated."

While it is plain that the existence of such a power in the magistrates is required in the interests of justice, it is equally evident that a discretionary power of indefinite adjournment might be exercised in such a manner as to amount in effect to a refusal to exercise the jurisdiction which was invoked in the particular case. Where such an abuse of this discretionary power has been established in proof, it is the duty of this Court to intervene, and to insist upon an exercise by the magistrates of the jurisdiction which they must be taken to have declined. The declining of jurisdiction may be either conscious and intentional or unconscious, on the part of the magistrates; but the result is the same so far as the administration of justice is concerned.

In *R.* (*Mulliner*) v. *Justices of Cork* (1) this Court came to the conclusion that there was an intentional evasion of duty and a declining of jurisdiction, and dealt with the case accordingly. In *R.* v. *Adamson* (2), and *R.* v. *Evans* (3), the magistrates were held to have acted with a *bona fide* belief that, so far from declining jurisdiction, they were exercising the jurisdiction vested in them in adjudicating as they did. I have no doubt that this was the belief of the magistrates in the case before us. Notwithstanding the good faith of the magistrates, the Court, in the cases to which I have referred, came to the conclusion that the discretionary power of the magistrates had not been exercised within the limits allowed by law. "I cannot resist the conclusion that the magistrates must have acted upon a consideration of something extraneous and extra-judicial, which ought not to have affected their decision, and which, it seems to me, was the same as declining jurisdiction": *The Queen* v. *Adamson* (2), *per* Cockburn, C.J., at page 205. In the words of Blackburn, J. (at page 206), "They proceeded on some ground which they ought not to have considered."

It would not be possible to enumerate the classes of considerations which would be, in the opinion of this Court, extraneous to

(1) 39 Ir. L. T. R. 117. (2) 1 Q. B. D. 201. (3) 54 J. P. 471.

summary proceedings for assault. The difficulty of drawing the line might, in many cases, be very great. But confining myself on this part of the case to the facts before us, I have no doubt that the pendency of a civil action of assault instituted by the defendant in the summary proceedings, although arising out of the same transaction, ought to be so regarded. The result of the civil action cannot determine the ultimate decision of the magistrates. Indeed a case is easily conceivable where the magistrates might, after the adjournment, find themselves unable to adopt the view of the facts of the case which was accepted by the jury in the action. The magistrates appear to have thought that the jury might be unfavourably influenced against the plaintiff in the civil action if he were obliged to admit that he had been convicted of assault. But it must be left to the Judge to instruct the jury in accordance with law as to the essential difference between civil and criminal proceedings. We must assume that he would direct the jury in accordance with the law as it has been so fully stated by my Lord, and we must assume that the verdict of the jury would be founded upon the facts proved in evidence, having regard to the instructions given to them by the Judge. Applying therefore to the present case the principles laid down in the cases referred to, I am clearly of opinion that the ground upon which the magistrates admittedly acted was extraneous to the case before them, and one which they ought not to have considered, and that we must, therefore, regard their order as amounting in substance and effect to a declining of jurisdiction.

WRIGHT, J.:—

I concur in the decision that has been arrived at by the other members of the Court, and substantially for the same reasons. In an ordinary case I should not add anything; but as the principle here involved is of more than ordinary importance, I wish to state very shortly the grounds of my decision.

It was laid down in *The Queen* v. *The Mayor of Clonmel* (1), and *The Queen* v. *Justices of County Cork* (2), that the Justices have

(1) 9 Ir. C. L. R. 267. (2) 18 L. R. Ir. 99.

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an inherent power to adjourn. But whether inherent, or created by statute, there can be no doubt that the Justices have the amplest power to adjourn for proper reasons. The language of section 20 of the Petty Sessions Act, whether conferring the power, or recognizing the power, is as wide as can be:—"Whenever, either before or during the hearing of any complaint, it shall appear advisable, the Justices present may, in their discretion, adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties or their agents." We are all agreed, therefore, and, indeed, this was not controverted, that the Justices have the amplest power of adjournment.

It is further admitted that the action of the magistrates was absolutely *bona fide*, thus distinguishing the present case from that of *Rex* (*Mulliner*) v. *Justices of Cork* (1). I need not recapitulate the facts in that case. It is enough to say that by a series of adjournments the Justices had shown a refusal to perform their duty. That was the argument put forward by the Attorney-General of the day, and the ground of the decision was, that there had been a substantial evasion of their duty by the magistrates. That case, therefore, has no application to the present, in which it is admitted by the Solicitor-General that the magistrates acted *bona fide*.

I come now to consider what the magistrates did here, and the grounds of their action. Mr. Early (the solicitor for the defendant in the summons) states in his affidavit that he applied for an adjournment of the summons, "representing that if there was an adjudication by the magistrates the order made by them would be used at the trial of the civil action, and might have some prejudicial influence with a jury, or other tribunal, that tried the case." On that ground, and on no other, the adjournment was granted. It is unnecessary for me, having regard to the very full judgments of my Lord, and my brother Madden, to consider the nature of a civil action. Of course, it had no relevance to, or connection with, the criminal proceedings. It could, in no way, influence or affect the criminal proceedings; while, on the other

(1) 39 Ir. L. T. R. 117.

hand, the decision of the magistrates in the criminal proceedings would not be evidence, and could not be alluded to in the civil action.

If the Justices had grounded their order for adjournment on any legal ground, this Court could not interfere; but if they ground it on reasons which ought not to be taken into account, their order cannot stand. I may refer to the cases which have been cited of *The Queen* v. *Adamson* (1), and *Reg.* v. *Evans* (2). In *The Queen* v. *Adamson* (1), Cockburn, C.J., being of opinion that the magistrates must have acted on consideration of something extraneous and extra-judicial, which ought not to have influenced them, held that they must be taken to have declined jurisdiction. In *Reg.* v. *Evans* (2), which resembles more nearly the present case, Lord Coleridge, C.J., points out that the jurisdiction of the magistrates must be exercised on judicial grounds.

The Solicitor-General has properly referred us to a case of *The King* v. *O'Gorman Mahon* (3), as having some analogy to the present case. In that case the defendant had been convicted of an assault, and was brought up for judgment. It appeared that the prosecutor had commenced an action for the same assault, and Lord Dennan, C.J., said that it was a rule that the Court could not pass sentence for an assault while an action was pending for the same assault. That, however, is a rule of practice, as distinct from a rule of law, and the reasons for it have been given in the judgment of my Lord.

What we have to consider is this—Was the adjournment granted on any legal ground? I am of opinion that it was not. It was granted on the ground that the decision of the magistrates might be used afterwards in the civil proceedings—a wholly extraneous and extra-judicial ground. The order for adjournment, therefore, cannot stand.

I can see very clearly that, not only in the present case, but in other cases, if this power of adjournment on irrelevant grounds were to be exercised, the greatest delay and injustice might result.

(1) 1 Q. B. D. 201. (2) 54 J. P. 471. (3) 4 A. & E. 575.

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LORD O'BRIEN, L.C.J. :—

My brother Dodd, who is unable to be here, agrees in the result at which we have arrived, and in the reasons assigned.

Solicitor for the prosecutor: *Malachy Kelly.*
Solicitor for Daniel M'Gonnell: *William Early.*

J. G. T.

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Dec. 15, 16, 18, 21.

THE KING (AT THE RELATION OF WILLIAM J. FITZGERALD) *v.* HENRY T. WRIGHT (1).

Local Registrar of Titles—Clerk of the Crown and Peace—East and West Riding of the County of Cork—Ridings separate counties—Relation—Quo warranto—*Order in Council—County Officers and Courts (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 8—*Petty Sessions Clerks and Fines Act*, 1878 (41 & 42 *Vict. c.* 69), *s.* 12—*Local Registration of Title (Ireland) Act* (54 & 55 *Vict. c.* 66), *s.* 4 (5).

By the Local Registration of Title (Ireland) Act, 1891, s. 4 (5), each local office shall be under the management and control of the Clerk of the Crown and Peace for the county, except in certain cases not material. The county of Cork is divided into two ridings, the East Riding and the West Riding, and, under the powers conferred by the County Officers and Courts (Ireland) Act, 1877, and the Petty Sessions Clerks and Fines Act, 1878, by Order in Council, dated 1st March, 1879, reciting that the offices of Clerk of the Crown for the county of the city of Cork, Clerk of the Crown for the county of Cork, and Clerk of the Peace for the county of Cork, were then vacant, and that the Clerk of the Peace for the county of the city of Cork was willing to accept the office of Clerk of the Crown for the county of the city, and it being deemed expedient that the offices should be united, it was directed that the offices of Clerk of the Crown and Clerk of the Peace for the county of the city of Cork, and the office of Clerk of the Crown and Peace for the East Riding of the county of Cork, should from thenceforth be and remain united, under the style and title of Clerk of the Crown and Peace for the county of the city of Cork and East Riding of the county of Cork; and it was further directed that the offices of Clerk of the Crown and of Clerk of the Peace of and for the West Riding of the county of Cork should be united, "under the style and title of Clerk of the Crown and Peace of and for *the county of Cork*."

(1) Before PALLES, C.B., and ANDREWS and BOYD, JJ.

When a vacancy occurred in the office of Local Registrar of Titles for the county of Cork by the death of O'G., Clerk of the Crown and Peace of and for the county of the city of Cork, and the East Riding of the county of Cork, his successor in the latter office, W., was appointed by the Lord Chancellor "Local Registrar of Titles in Cork, in place of the late O'G." F., who at the time filled the office of Clerk of the Crown and Peace of and for the West Riding of the county of Cork, under the style and title of Clerk of the Crown and Peace of and for *the county of Cork*, claimed the office of Local Registrar of Titles as being the person referred to in the provision of the Local Registration of Title (Ireland) Act, 1891, that each local office shall be under the management and control of the Clerk of the Crown and Peace for the county:

Held, that, although the Local Registration of Title (Ireland) Act, 1891, does not of itself contain any definition clause indicating that "county" may include riding of a county, still, upon the reading of the County Officers and Courts (Ireland) Act, 1877, and the Petty Sessions Clerks and Fines Act, 1878, the word "county" is to be treated as so defined in the Local Registration of Title Act, for the purpose of which the two ridings of the county of Cork are, accordingly, to be treated as two separate counties.

Held, therefore, that the words of the Order in Council of the 1st March, 1889, giving to the Clerk of the Crown and Peace for the West Riding of the county of Cork the style and title of Clerk of the Crown and Peace of and for the *county of Cork*, under which F. claimed the office of Registrar of Titles for the whole county of Cork, were of no effect, and that F. held no more extended office than that of Clerk of the Crown and Peace for the West Riding of the county of Cork.

Held, also, that the local office in the county of the East Riding of Cork should be under the control and management of W., and that the local office in the county of the West Riding of Cork should be under the control and management of F., unless, in the opinion of the Lord Chancellor, F. was not qualified to discharge the duties of the office.

Held, also, that F., although failing as to the full extent of his claim, had such an interest in the subject-matter as to constitute him a competent relator to file an information in the nature of a *quo warranto* against W.

MOTION, of which notice was served by leave of the Court, for an order that the relator, William J. Fitzgerald, might be at liberty to file an information in the nature of a *quo warranto* against Henry T. Wright for usurpation of the office of Registrar of Titles in the local office for the county of Cork, under the Local Registration of Title (Ireland) Act, 1891, upon the grounds that the relator, as Clerk of the Crown and Peace for the county of Cork, was the person prescribed by statute to have the management and control of the said local office; that the relator, as Clerk of the

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Crown and Peace for the said county, or as Clerk of the Crown for the said county, or as Clerk of the Peace for the said county, was a person eligible and qualified to have the management and control of the said local office, and had an interest in the premises and in the issue of the information prayed for; that Henry T. Wright was not the Clerk of the Crown and Peace for the county of Cork, nor was he the Clerk of the Crown for the said county, nor was he the Clerk of the Peace for the said county; and that Henry T. Wright was not a person within the meaning of section 4 (5) of the Local Registration of Title (Ireland) Act, 1891, eligible or qualified to be appointed to the management and control of the local office for the county of Cork. The case made by the relator was that, prior to the year 1823, the whole of the county of Cork constituted one administrative unit and the county of the city of Cork constituted another separate unit. By the Act of 4 Geo. 4, c. 93, the county of Cork was, for the limited purposes in the statute set forth, divided into two ridings, with the proviso that the division should not affect the status, authority, or jurisdiction of certain officers, including the Clerk of the Crown and Clerk of the Peace. Under the said statute the Clerk of the Crown was unaffected in his office, and the Clerk of the Peace was specifically empowered to transact duties connected with the Quarter Sessions in both ridings. From September, 1823, when the Act came into operation, until the date of the Order in Council hereinafter mentioned, the office of Clerk of the Crown for the county of Cork was held as a separate office, and the office of Clerk of the Crown for the county of the city of Cork as another separate office. The offices of Clerk of the Peace for the county and city, respectively, were also separate offices. By the County Court Officers and Courts (Ireland) Act, 1877, power was given to the Lord Lieutenant in Council to unite, and otherwise deal with, the offices of Clerk of the Crown and Peace in the several counties and boroughs in Ireland. Under the Petty Sessions Clerks and Fines (Ireland) Act, 1878, further provision was made for the salaries to be attached to these offices.

By Order in Council, dated the 1st March, 1879, provision was made for the union of the offices, and for the discharge of the duties in connexion with, or relating to, the Courts of General

Sessions of the Peace, and the Civil Bill Courts, holden in the East Riding of the county of Cork, by an officer under the style and title of Clerk of the Crown and Peace of and for the county of the city of Cork, and East Riding of the county of Cork; and (according to the relator's construction of the Order) it was further provided that all other duties of the Clerk of the Peace throughout the whole of the county of Cork, and all the duties whatsoever of the Clerk of the Crown, in the whole county of Cork, should be discharged by an officer appointed under the style and title of Clerk of the Crown and Peace of and for the county of Cork. The first holder of the united office of Clerk of the Crown and Peace of and for the county of the city of Cork and East Riding of the county of Cork, was one William O'Keeffe; and the first holder of the united office of Clerk of the Crown and Peace of and for the county of Cork, was one Thomas Babington. Upon the passing of the Local Registration of Title Act, 1891, Thomas Babington was still the holder of the latter united office, but was of great age and in feeble health, and was unable to undertake the additional duties prescribed by this Act; and in pursuance of the provisions thereof, the Lord Chancellor appointed Mr. Standish O'Grady, who had succeeded Mr. O'Keeffe in his office, and who previous to his appointment had been practising as a solicitor, to act as, and discharge the duties of, Registrar of Titles for the county of Cork, for the discharge of which, by reason of the matters aforesaid, Thomas Babington was unable and unfit. Thomas Babington died in July, 1894, and the relator was appointed his successor by warrant, as follows:—

"By the Lord Lieutenant and General Governor of Ireland.

"HOUGHTON.

"Whereas the united office of Clerk of the Crown and Peace of and for the West Riding of the county of Cork is now vacant by the death of Thomas Babington, Esq.

"Now we, Robert Attley Ashburton, Baron Houghton, Lord Lieutenant General, and General-Governor of Ireland, do hereby in pursuance of the powers vested in us by the County Officers and Courts (Ireland) Act, 1877, and of all other powers

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us thereunto enabling, appoint William J. Fitzgerald, Esq., being a practising solicitor of six years' standing, to be Clerk of the Crown and Peace of and for the West Riding of the county of Cork, under the style and title of Clerk of the Crown and Peace of and for the county of Cork, to hold the said office upon the conditions in such case made and provided.

"Given at Her Majesty's Castle of Dublin, this 29th day of August, 1894.

"By His Excellency's Command,

"D. HARRELL."

By the Local Registration of Title Act, 1891, it was provided that each local office under the Act should be under the management and control of the Clerk of the Crown and Peace for the county, if the offices were united, or of the Clerk of the Crown, or Clerk of the Peace, as chosen by the Lord Chancellor, in case the offices were not united, or in case the Clerk of the Crown and Peace should be unfit, by such person, being a solicitor, as should be appointed by the Lord Chancellor for that purpose. A vacancy in the office of Local Registration of Titles for the county of Cork took place in August, 1905, whereupon the relator claimed that it was his right and duty under the statute to manage and control the local office. Mr. Henry T. Wright, however, claimed the control and management of the office by virtue of an appointment by the Lord Chancellor, in the following terms:—

"I hereby appoint Henry T. Wright, Esq., solicitor, to be Local Registrar of Titles in Cork, in the place of the late Standish O'Grady, at such salary and with such emoluments as may be prescribed by competent authority under the Local Registration of Title (Ireland) Act, 1891, and all other powers.

"ASHBOURNE, *C.*

"1*st September*, 1905."

The relator contended that he was the only person who answered the description in the statute, of Clerk of the Crown and Peace for the county of Cork, and he further said that the Lord Chancellor had not formed or expressed any opinion,

that he was not qualified to discharge the duties of the office. In the alternative, he said that he was the only person who would answer to the description in the statute of a person, who in case of the non-union of the offices could be chosen by the Lord Chancellor. Mr. Henry T. Wright was not the Clerk of the Crown and Peace for the county of Cork, nor was he the Clerk of the Crown nor Clerk of the Peace within the meaning of the statutes for the county.

Mr. Wright relied upon his warrant of appointment, dated 1st September, 1905, to the united office of Clerk of the Crown and Peace of and for the county of the city of Cork, and the East Riding of the county of Cork, and on his appointment of the same date by Lord Ashbourne, the Lord Chancellor, to be Local Registering Authority, pursuant to the Local Registration of Title (Ireland) Act, 1891, for the East and West Ridings of the county of Cork, and for the county of the city of Cork, he then and since being a solicitor; and since the date of his appointment he had acted and continued to act as the Local Registering Authority. At the time of his appointment as Local Registering Authority, Mr. W. J. Fitzgerald submitted to Lord Ashbourne, as Lord Chancellor, an application claiming to be appointed to the office of Local Registrar of Titles; but the Lord Chancellor, with this application before him, and well knowing the position and office occupied by Mr. W. J. Fitzgerald, the relator, exercised the discretion vested in him in that behalf, and appointed Mr. Wright as Local Registering Authority. Since his appointment no demand was even made to him, either verbally or in writing by the relator, nor did the relator since his appointment in the year 1894 as Clerk of the Crown and Peace for the West Riding of the county of Cork, challenge or claim the office of Local Registrar of Titles, then held by Mr. Wright's predecessor, the late Mr. Standish O'Grady, who died on the 22nd August, 1905, and by Mr. Wright subsequent thereto until the present application was first instituted on the 27th November, 1908. Mr. Wright denied that he had usurped the office, and he claimed that he was legally entitled to remain in possession of same, having been appointed thereto by competent authority.

During the argument a correspondence was referred to

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originating with two letters dated the 31st August, 1905, and 9th September, 1905, from the relator to the Lord Chancellor (Lord Ashbourne), applying for the position of Registrar of Titles, and claiming the office under the Act of 1891, unless the Lord Chancellor was of opinion that he was not qualified to discharge the duties. The Under Secretary (Sir James B. Dougherty) wrote on the 13th September, 1905, informing the relator that Mr. Henry Wright had been already appointed to the position which had been held by the late Mr. Standish O'Grady, his predecessor in the office of Clerk of the Crown and Peace for the city and East Riding of Cork.

The relator wrote on the 16th September, expressing himself deeply aggrieved by the action that had been taken, and asking for an interview with the Under Secretary, which was accorded. After the interview he wrote as follows:—

"GRESHAM HOTEL, DUBLIN,
"*September* 18*th*, 1905.

"SIR,—Referring to your letter of the 13th and to our interview of to-day, I beg to lay before you for the consideration of the Lord Chancellor the following reasons why the office in question attaches by legal right to my position.

"The statute of 1891 provides that the Clerk of the Crown and Peace *for the county* shall be the Registrar of Titles unless such person is not, in the opinion of the Lord Chancellor, qualified to discharge the duties of the office.

"I am Clerk of the Crown and Peace *of and for the county of Cork*, and as such have for eleven years discharged all the duties for the whole county.

"When the Act of 1891 came into force, my predecessor, the late Mr. T. Babington, was of such great age and feeble health that he was not considered qualified, and the late Mr. O'Grady thus received the office, although this was a matter entirely in the discretion of the Lord Chancellor, who might have appointed any other solicitor.

"Mr. O'Grady was only 'Clerk of the Crown and Peace for the city of Cork and East Riding of the county of Cork,' which is the office to which Mr. Wright has succeeded.

"I alone am the official fulfilling the qualifying office within the description of the statute, viz.: Clerk of the Crown and Peace *for the county of Cork*. And section 4, sub-section 3, of the Act provides that a county of a city shall form part of the county at large.

"I can quite understand how it was assumed that, as Mr. O'Grady was Registrar of Title, the office would naturally devolve on his successor.

"If, however, the non-appointment of Mr. Babington be considered in the light of the statute, I feel certain that the Lord Chancellor will determine that the position is annexed to my office according to law.

"I may mention that I alone have performed the duties under the Grand Jury Acts and the criminal procedure for the entire county.

"I remain in Dublin until Wednesday, should his Lordship desire an interview.—Your obedient servant,

"WM. J. FITZGERALD."

Received formal reply on the 20th September, saying that the Lord Chancellor was out of town.

The following subsequent letters passed:—

"DUBLIN CASTLE,

13*th October*, 1905.

"SIR,—Adverting to previous correspondence on the subject of the manner in which the duties under the Local Registration of Title (Ireland) Act, 1891, should be assigned in respect to the county of Cork, I am directed by the Lords Justices to inform you that Their Excellencies are advised that upon the true construction of the statutes in that behalf and the Order in Council of the 1st of March, 1879, there must be two appointments to the office of Local Registrar of Titles, namely, the Clerk of the Crown and Peace for the county of the city of Cork and East Riding, as Local Registrar for the city of Cork and East Riding, and the Clerk of the Crown and Peace of and for the county of Cork as Local Registrar for the West Riding. You accordingly become

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the Local Registrar for the county of Cork, West Riding, and you will be entitled under section 7 of the above-quoted Act to such increase of salary for additional duties imposed on you by the Act as the Lord Chancellor, with the consent of the Treasury, may direct.

"I am to add it would be desirable for you to communicate with Mr. H. Brougham Leech, LL.D. (the chief officer of the Central Department), Local Registration of Title, Central Office, Four Courts, Dublin, with a view to obtaining his guidance as to the best manner of dividing the business of the two ridings,—I am, sir, your obedient servant,

"J. B. DOUGHERTY."

"GRESHAM HOTEL,

"19*th October*, 1905.

"SIR,—I rest my claim to the position of Registrar of Titles for the county and city of Cork on the various statutes and orders, including the Order of the 1st March, 1879, referred to in yours of the 15th inst. The latter part of this Order defines the duties of the two clerks, and specifically names the duties to be performed by the Clerk for the East Riding. Then it goes on to specify the duties of the Clerk of and for the county thus :—'All the duties heretofore performed by or *attaching to the office of the Clerk of the Crown* of and for the county of Cork.' Then it deals with the duties of the Clerk of the *Peace* of and for the county of Cork, relating to the Quarter Sessions for the *West Riding*, and it continues, 'and all other duties (if any) heretofore performed by or attaching to the office of the Clerk of the *Peace* of and for the county of Cork *not heretofore* prescribed to be performed by the Clerk of the Crown and Peace of and for the city of Cork and East Riding of the county of Cork.'

"No duties beyond the *Quarter Sessions* were deputed to the Clerk for the East Riding.

"I and my predecessors, since the positions of Clerk of the Crown and Clerk of the Peace were created, have discharged all the duties relating to the fiscal and criminal administration of the

county at large, and I still continue to do so. All the records and documents dealing with Grand Jury, Assize, &c., &c., are in my custody.

"Section 2 of the Act of 1891 provides that a city shall form part of the *county at large*, which could not indicate a riding of a county.

"I, therefore, respectfully appeal to the Lord Chancellor to reconsider the matter in the light of the foregoing facts.

"I may be permitted to mention that the suggested division would be almost, if not altogether, unworkable. Great numbers of holdings are situate partly in each riding, and I have never seen a deed describing any plot as in one or the other riding. I am remaining here until I learn whether my personal attendance may be required.—I remain, &c.,

"W. J. FITZGERALD."

"DUBLIN CASTLE,

"*9th February*, 1906.

"SIR,—Adverting to previous correspondence on the subject of the arrangements to be made for the Local Registration of Titles for the county of Cork, I am directed by the Lord Lieutenant to inform you that His Excellency is advised that the local office for the purpose should be in the city of Cork, the Assize town; and that the management and control of the office should be under you and Mr. Wright, who holds the united offices of Clerk of the Crown and Clerk of the Peace for the East Riding of the county, and for the Cork city.

"I am, accordingly, to request that you will forthwith communicate with Mr. Wright, with a view to making the necessary arrangements in communication with Mr. Brougham Leech, the Chief Officer of the Central Department. Upon the necessary arrangements being completed to the satisfaction of the Registrar of Titles, application will be made to the Treasury with a view to the fixing of your salary in respect to these registration duties.—I am, Sir, your obedient servant,

"J. B. DOUGHERTY."

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"DUBLIN CASTLE,

"*2nd March*, 1906.

"SIR,—Adverting to previous correspondence on the subject of the arrangements to be made for the Local Registration of Titles for the county of Cork, I am directed by the Lord Lieutenant to inform you that the matter having been again referred to the Law Officers of the Crown, they advise 'that neither Mr. Wright nor Mr. Fitzgerald is Clerk of the Crown and Peace for the county of Cork, so as to be entitled to the office of Local Registrar under the Local Registration of Title (Ireland) Act, 1891.' In their opinion the Act of 1891 contemplated only a single office for the county at large, and prohibits a solution of the difficulty by the appointment of you and Mr. Wright as Local Registrar each for your own riding. The case thus appears to be one of *casus omissus*, which should be dealt with by legislation. In these circumstances, the Lord Chancellor has directed that the arrangement whereby Mr. Wright is acting as Registrar for the entire county shall continue as a provisional arrangement, pending the necessary legislation, which will be forthwith taken into consideration.—I am, Sir, your obedient servant,

"J. B. DOUGHERTY."

Ronan, K.C., Healy, K.C., and *M'Sweeny*, for the relator.

The Right Hon. J. H. Campbell, K.C., Henry, K.C., and *The Hon. Cecil Atkinson*, for the defendant.

Cur. adv. vult.

Dec. 21.

PALLES, C.B.:—

This is an application that the relator may be at liberty to file an information in the nature of a *quo warranto*, against the defendant, in respect of the office of Registrar of Titles in the local office in the county of Cork, under the Registration of Title (Ireland) Act, 1891.

Had the only question raised by the defendant been that his title to the office was a valid one, I should have been of opinion that the question was of such a character as ought to be put upon the record, so as ultimately to be capable of being brought to the

highest tribunal of appeal; and in that case I should have abstained from offering any definite opinion as to that title, lest embarrassment or difficulty might be thereby caused to the Judge at the trial.

That, however, is not the case. The principal ground of the resistance of the defendant to the order sought is based upon the alleged incompetency of Mr. Fitzgerald as a relator. Whether he is, or is not, is a matter that must be decided on motion. It cannot be put upon the record, as can anything in relation to the defendant's title; and, unfortunately, the titles, or alleged titles, of these two gentlemen are so inextricably mixed up, depending as they do upon the view we take of the same facts, that it is impossible to express an opinion upon one without almost determining the other. But however this may be, I am bound to determine the competency of the relator, and I proceed to do so.

The office in controversy is alleged to have been created by the 54 & 55 Vict. c. 66, entitled, "An Act to establish Local Registration of Titles to Land in Ireland," the 4th section of which enacts by its 1st sub-section, "There shall be established and maintained in Ireland, under the registering authorities hereinafter mentioned," certain registers of owners of land; and the 2nd sub-section provides that there shall be a central office in the city of Dublin, and a local office in *each county* in Ireland.

By sub-section 5, each local office (subject to the direction and control of the Registrar of Titles in such matters as shall be prescribed) shall be under the management and control of the Clerk of the Crown and Peace *for the county*; or if the offices of Clerk of the Crown and Clerk of the Peace are not united, of the Clerk of the Crown, or Clerk of the Peace, as the Lord Chancellor may direct. But if such person is not, in the opinion of the Lord Chancellor, qualified to discharge the duties of the office, then such office shall, subject as aforesaid, be under the management and control of such other person, being a solicitor, as shall be appointed by the Lord Chancellor for that purpose.

Sub-section 6 enacts that each local office shall be in the office kept by the Clerk of the Crown and Peace *for the county*, pursuant to the provisions of the County Officers and Courts (Ireland) Act,

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1877, or in such other place in the county as the Lord Chancellor shall from time to time direct.

Sub-section 7 provides that the Clerk of the Crown and Peace for *each county*, or such other person as shall be appointed by the Lord Chancellor as aforesaid, shall be the registering authority appointed for the purpose by this Act.

Under these provisions, if the relator, at the time of the appointment of Mr. Wright, were Clerk of the Crown and Peace for the entire county of Cork; or, if the offices of Clerk of the Crown and Clerk of the Peace for that county were not then united, and Mr. Fitzgerald were the Clerk of the Crown for the entire of that county, or Clerk of the Peace for the entire county, he would unquestionably be competent as a relator; and the first question for our consideration is, Were any of those offices then in existence?—for if they were not, then Mr. Fitzgerald could not have filled any one of them.

To determine this question, we must go to the County Officers and Courts (Ireland) Act, 1877, and the Petty Sessions Act, 1878, under which alone the united office of Clerk of the Crown and Peace could exist.

By section 8, sub-section 1, of the Act of 1877, whenever either of the offices of Clerk of the Crown or Clerk of the Peace for any county or borough became vacant, if the person then holding the other of the said offices were willing to accept the vacant office, the Lord Lieutenant was empowered to order that both the offices should be united, and to appoint such person to such vacant office, and the person holding the same was directed to be called the Clerk of the Crown and Peace for the county or borough.

By sub-section 2 of that section 8, whenever both the offices of Clerk of the Crown and Clerk of the Peace for any county or borough were vacant at the same time, "the Lord Lieutenant *shall* order that the said offices shall be united . . . and the said offices shall thenceforth remain united, and the person holding the same shall be called the Clerk of the Crown and Peace for the county or borough."

By the interpretation clause (sect. 7), the word "county" includes county of a city, and riding of a county; and the Act, by its schedule D, prescribes the salaries of Clerks of the Crown

and Peace; and by it one salary only is included for Cork city and county, viz., £1100. This sum appears to be the salary intended for one officer, filling an office to be created by the union of the four offices of the Clerks of the Crown and Clerks of the Peace for the county and city.

This Act was amended by section 12 of the Petty Sessions (Ireland) Act, 1878, c. 69. By that section the powers conferred by the 8th section of the Act of 1877 were extended to every case in which any one or more of the offices included, or which might be included, in any united office, should become vacant; and after a provision as to salaries, which is not material here, the section proceeds:—

> "The several powers aforesaid shall extend, and may be applied, to *each riding* of the county of Cork *as a separate county*; and either riding may, for the purposes of the said Act, be united with the county of the city of Cork."

The section also confers power upon the Lord Lieutenant in Council to define, distribute, prescribe or regulate the duties under those Acts of 1877 and 1878 of every officer appointed to any office included, or which might be included, in any union of offices made, or which might be made, under any of the above powers.

Such was the state of the law when the Privy Council Order of 1st March, 1879, was made. That Order recites that the offices of Clerk of the Crown for the county of the city of Cork, Clerk of the Crown for the county of Cork, and Clerk of the Peace for the county of Cork, were then vacant; that Mr. O'Keeffe, the Clerk of the Peace for the county of the city of Cork, was willing to accept the vacant office of Clerk of the Crown for the county of the city; and that it was deemed expedient that the offices should be united.

These facts show that under sect. 8, sub-sect. 1, of the Act of 1877, the Lord Lieutenant had power to order that these offices should be united; and the same facts brought into operation the power conferred by the Act of 1878 to apply the powers created by the Act of 1877 to either riding, or to both ridings, of the county of Cork, as separate counties. So applying them, there was power to unite either riding with the county of the city of

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Cork; and, accordingly, the Order directs that the offices of Clerk of the Crown and Clerk of the Peace for the county of the city of Cork, and the offices of Clerk of the Crown and of Clerk of the Peace for the East Riding of the county, shall be, and from thenceforth remain, united, under the style and title of Clerk of the Crown and Peace of and for the county of the city of Cork, and the East Riding of the county of Cork.

So far, everything appears to have been regular. Mr. Ronan has argued that under the state of facts I have mentioned, there was a statutory obligation on His Excellency to unite the Clerkship of the Crown and the Clerkship of the Peace for the entire county into the one office of Clerk of the Crown and Peace for the entire county of Cork. I cannot agree in that view. That would have been his obligation, but for the Act of 1878; but that Act entitled him, for the purpose of his action under the joint operation of the two Acts, *quoad* the matter in hand, to deal with the vacancies as if each riding of the county were a separate county, and, therefore, *as if* the vacant county offices were those of—(1) Clerk of the Crown for the East Riding; (2), Clerk of the Crown for the West Riding; (3) Clerk of the Peace for the East Riding; and (4) Clerk of the Peace for the West Riding. It is not necessary for me to say, and I do not say, that these four separate offices ever existed in fact; but the only mode in which the action of the Lord Lieutenant contemplated by the two Acts can have effective operation is by viewing those separate offices *as if* they had existed, because the union under sect. 8, sub-sect. 2, of the Act of 1877, of the two separate offices in a riding which under the Act of 1878 was to be dealt with *as if it were a separate county*, involved each of the offices of the Clerkship of the Crown and the Clerkship of the Peace for that entire county being deemed to have been split up into two separate offices, or *quasi* offices, being one for each of the two ridings which was to be deemed a county, and these *quasi* offices, notionally at least, should exist as offices for a moment, in order that they might be united by the Order of the Lord Lieutenant. The statutory obligation upon His Excellency would be satisfied by his uniting the offices (had they existed) of the Clerkship of the Crown, and the Clerkship of the Peace, in each riding, into one office under the style of the office of Clerk of the Crown

and Peace for that riding, and appointing one person to that united office; and it must be equally satisfied, although they did not exist, if they are to be deemed to have existed.

This lawful severance, for the purposes of the Acts of 1877 and 1878, of the East Riding of the county of Cork from the entire county, necessarily extinguished the theretofore existing offices of Clerk of the Crown and of Clerk of the Peace for that entire county; and there was, therefore, power in the Lord Lieutenant under the conjoint operation of sect. 8 of the Act of 1877, and sect. 12 of the Act of 1878, to unite into one office the parts (notionally still existing as offices) of the extinguished offices, which related to the remaining portion of the county—in other words, he had power to create a new office, that of Clerk of the Crown and Peace for the county of the West Riding of the connty of Cork. This office the Order in Council accordingly creates:—

> "The offices of Clerk of the Crown and of Clerk of the Peace of and for the West Riding of the county of Cork shall be united."

Then follow the words:—

> "under the style and title of the Clerk of the Crown and Peace of and for the county of Cork."

For what reason this style and title was conferred upon the new office, I cannot comprehend.

It was argued by Mr. Ronan that, under this Order, the relator was Clerk of the Crown and Peace for the entire of the county of Cork, for two reasons; firstly, because he was appointed to the office which, under the Order, is directed to bear that style and title; and his duties under that Order include "all the duties heretofore performed by, or attaching to the office of, the Clerk of the Crown for the county of Cork," *i.e.* the entire county; so that as well by duties as by style and title he is the Clerk of the Crown and Peace for the entire county: secondly, because his office having the lawful style and title of that of "Clerk of the Crown and Peace for the county of Cork," he, and he alone, answers the description in the statute.

In my opinion, the statute contemplated the person actually

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being the designated officer, and thus the question is reduced to this: Is Mr. Fitzgerald now, and was he at the time of the coming into operation of the Act of 1891, "the Clerk of the Crown and Peace for the county of Cork"?

Now that office cannot exist, except under an Order of the Lord Lieutenant. All such offices are the creatures of a statute which directs their creation to be by Order. Consequently, we have to do no more than to construe that Order as a whole; and we are bound so to construe it as, if possible, to give effect—lawful effect—to every part of it. When it was made, the powers vested in His Excellency, for the purpose of the creation of offices of Clerks of the Crown and Peace in the county of Cork, included, as I have already shown, three, viz.:—

1. Power to unite the offices of the Clerk of the Crown and of the Clerk of the Peace in the city of Cork with the corresponding offices in the county, so far as same related to one riding, *i.e.*, he had power to create the office Mr. Wright now holds. Any exercise of this power was inconsistent with the continuance of the office of Clerk of the Crown for the entire county; and if the offices were not validly united, the Lord Lieutenant would not have power to create the office which Mr. Fitzgerald holds, which would have united one riding of the county of Cork with the city of Cork. It could not be given under the previous legislation, which did not contemplate the existence of the office of Clerk of the Crown and Peace; and therefore, if Mr. Ronan's contention is correct, it seems to me that the office held by Mr. Fitzgerald was one which the Lord Lieutenant at the time had no power to appoint to.

2. His Excellency had power, contemporaneously with the exercise of the first power, but not sooner, to create the office of Clerk of the Crown and Peace for the other riding; *i.e.*, the office Mr. Fitzgerald holds.

3. He had power to define, distribute, prescribe, and regulate the duties of each office, so that he could direct the duties formerly performed in the East Riding by the Clerk of the Crown to be thenceforward performed by the Clerk of the Crown and Peace for the West Riding.

There were, however, two things which he had no power to do.

(1) He could not constitute two offices, one of which should be or should include the office of Clerk of the Crown for a county or riding, and the other of which should include the office of Clerk of the Peace for the same county or riding. One office could not include the office of Clerk of the Crown for the East Riding, and another office include that of Clerk of the Peace for the same riding. (2) His Excellency could not do indirectly what could not be done directly; and if he had power to attach any style or title to the office (which I gravely doubt), he certainly had no power, by attaching any particular style or title, to vary the character which was essential to the validity of the office. In my opinion, the title ascribed to the office held by the relator did not make him that which he was not, and could not be—Clerk of the Crown and Peace for the entire county.

I treat, then, so much of the Order in Council as purports to ascribe to Mr. Fitzgerald's office the title of "Clerk of the Crown and Peace of and for the county of Cork" as ineffective; and doing so, every other part of the Order, including Mr. Fitzgerald's appointment, is legal; and if I do not so treat it, then Mr. Fitzgerald's office cannot have legal existence. Let me, however, observe that I have not any doubt as to the legal existence of Mr. Fitzgerald's office. He was appointed to the office of Clerk of the Crown and Peace for the *West Riding* of the county of Cork; and the erroneous and misleading title attached to it I regard as a separable accessory, the addition of which cannot invalidate the office which, without it, would have been legally constituted.

I am therefore of opinion that Mr. Fitzgerald is not Clerk of the Crown and Peace for the entire of the county of Cork. Neither is he, nor was he, Clerk of the Crown for the entire county of Cork, nor Clerk of the Peace for the entire county of Cork. Both of those offices became extinguished by the creation of the new offices in 1879. He is, in my opinion, Clerk of the Crown and Peace for "the county of the West Riding of the county of Cork," which is *ad hoc* a separate county; and in my opinion he holds no other office.

I now come back to the Act of 1891 (1), the Local Registration

(1) 54 & 55 Vict. c. 66.

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of Title Act, to ascertain the effect of these conclusions upon the rights of Mr. Fitzgerald under that Act:

> "Each local office shall . . . be under the management and control of *the Clerk of the Crown and Peace for the county.*"

It is true that the word "county," in an Act of Parliament, *prima facie* means the geographical district known as the county. It is true also that the Registration of Titles Act does not contain any definition clause indicating that "county" includes riding of a county; but it seems clear to me that in construing subsection 5, which ascertains the designated officers by the existing offices which they hold, those existing offices being, in the case in hand, those of the Clerk of the Crown and Peace for the county, we are necessarily driven back to the Acts of 1877 and 1878, under which those offices were constituted, to ascertain the district of the country which answers to the word "county" in the description "The Clerk of the Crown and Peace for the county"; and thus referring back, the Act of 1878, must be read as an amendment or enlargement of, and therefore as part of, section 8 of the Act of 1877; and reading both enactments together, it is apparent to my mind that "Clerk of the Crown and Peace for the County," in reference to the county of Cork, refers not to one single office of one single county, but to two offices, each of one riding of that county, which, for the purposes of the Acts of 1877 and 1878, and consequently for the purposes of the Act of 1891, must be regarded as separate counties.

Mr. Ronan, who never omits any argument worthy of consideration in support of his contention, rightly called our attention to the fact that, whilst the Civil Bill Act of 1851 (1) extends the ordinary meaning of the word "county," by providing that it may include a riding of a county, as well as the county of a city and a county at large, the Act of 1891, although it, too, extends the meaning of the same word, "county," so extends it merely by enacting that a city or town, or county of a city or town, shall form part of the county at large in which it, or the greater part

(1) 14 & 15 Vict. c. 57, s. 162.

of it, is situated. The contrast between the extensions in these two statutes is, he contends, stronger than a mere omission, and affords an affirmative argument against the enlarged construction I have adopted.

I am far from saying that Mr. Ronan is not entitled to rely upon that argument. I do not fail to appreciate it; and were not the demonstration in favour of the extended construction which is afforded by the practical incorporation, *ad hoc*, of the statutes of 1877 and 1878, to which I have already called attention, it might have had great weight with me. Even then, however, it would be capable of explanation; for, in the Act of 1851, the extension to ridings is attached to certain specified purposes only, and those ridings, for those specified purposes, are, by section 25, made the subject of particular and special enactment. The meaning of the word in that Act was in the "special" contemplation of the Legislature, whilst in the Act of 1891 the Legislature viewed "county" in a general sense only—in the sense of being one of a number of districts in Ireland, the totality of which comprised the entire of Ireland.

Again, Mr. Ronan thought he might rely on the clearness of the Yorkshire Registration Act, which, of course, is not *in pari materiâ* here. Used as an example of how the statute might have precluded argument, I agree that the Yorkshire Act is more clear; but if, in addition to our difficulties in interpreting modern draftings, we are to institute a comparison as to the lucidity of the Act under construction, and other Acts not *in pari materiâ*, our position would be a hopeless one. It would be the old story, of that which "might have been." In consequence of the opinion of the present law officers, I suppose I ought to believe that the meaning ought to have been made clearer; but my concern is with that which is, not with that which might have been, and, for me, the meaning is sufficiently clear.

I have, therefore, arrived at the conclusion—and, I must say, without any substantial doubt—that the local office in the county of the East Riding of Cork should be under the management and control of Mr. Wright; and that the local office in the county of the West Riding of Cork should, unless, in the opinion of the Lord Chancellor, the relator is not qualified to discharge the duties of

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the office, be under the control and management of the relator. This construction appears to be that adopted by the Irish Government in 1905, as evidenced by the Assistant Under Secretary's letter to Mr. Fitzgerald, of the 13th October in that year.

Then comes the question, Is Mr. Fitzgerald a qualified relator? To qualify him it is not necessary that he should show title to the office which is the subject of the *quo warranto*. If he has an interest, other than that which every one of the general public has, in showing that Mr. Wright is not the legal holder of the office for the entire of the county of Cork, it is sufficient. "He alone," says Mr. Shortt, in his valuable work on Informations, page 157, "is a competent relator, who has some interest other than such as may belong to the community at large in the question to be tried by *quo warranto*, and who has not, by any of the modes already adverted to, disqualified himself from acting as prosecutor."

I am of opinion that Mr. Fitzgerald has such an interest. If it be established by the judgment of this Court that the defendant is not the lawful holder of the office of Local Registrar for the entire of the county of Cork, then Mr. Fitzgerald will be entitled to the office of Local Registrar for the West Riding, unless, in the opinion of the Lord Chancellor, he is not qualified to discharge its duties. This potential title is a sufficient interest, as it is impossible that he can act in that office unless there shall previously be a judgment of ouster against Mr. Wright.

As to the difference between the claim made by the relator in his application and that which, in my opinion, he can sustain, I have to observe that both arise upon the same documents and facts, all of which are brought before us in the affidavit on which the conditional order was granted. The difference between them is one of law only—one as to the construction and effect of the Order in Council of the 1st March, 1879, and involves no matter of fact. The admitted acting of the defendant in the so-called office, from which in this proceeding it is sought to oust him, constitutes an infringement of the relator's right, as I hold it to exist, as well as of the fancied right upon which he relied in his affidavit; and substantially (although not strictly in point of law,

as offices are indivisible) the right he has sustained is included as parcel in the right claimed. A proceeding by *quo warranto* is the only one by which the relator can effectually establish the right he has sustained, and obtain a remedy for its infringement; and if we refused this motion on the ground of incompetence of the relator, a new application might be made to-morrow on affidavits similar to those before us, except by omitting matters of law; and I do not see how, in justice, that application could be refused. Between the present application and a fresh one on such new affidavits there would be in law no difference, as matters of law are not germane to an affidavit, and the matters which, under Order LXXXIV., are to be specified, are the objections to the title of the defendant, not the particular nature of the interest claimed by the relator. Although that interest must be shown, and the facts from which it arises must be proved, a claim, under an erroneous construction of the documents brought before the Court, of a greater extent than legally exists, is not, in my opinion, a fatal objection, provided *an* interest sufficient to qualify the relator is *shown by the documents* relied upon by the defendant as showing the relator's claims. Consequently, I am of opinion that Mr. Fitzgerald has shown sufficient interest to make him a competent relator.

Passing now to the other matters relied upon by the defendant, I shall be very brief, because I am unwilling to bind myself to anything which may hereafter become a subject of consideration in a more solemn manner in a Court of which I may be a member. They can be shortly summarized—He relies (1) upon the order of the Lord Chancellor, (2) upon delay, and (3) upon what he suggests may be the momentous consequences, as regards the title to lands in the West Riding of Cork registered by Mr. Wright, if any doubt be cast upon the validity of his appointment.

(1) As to the first, I am of opinion that a question arises upon the actual appointment of Mr. Wright by the Lord Chancellor, as to whether it extends to the West Riding of Cork:—"I hereby appoint Henry T. Wright, Esq., solicitor, as Local Registrar of Titles for the county and city of Cork, in the room of the late Standish O'Grady, Esq.," &c.

If I am right as to the construction and effect of the Order in

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Council of the 1st March, 1899, I think it is capable of being argued that this is, on its face, a valid appointment of Mr. Wright to have the management and control of a local office in the city of Cork, which is in the East Riding of the county of Cork, and that it does not extend beyond that. I express no definite opinion upon the question, further than that I think it is one worthy of consideration.

I am further of opinion that there is some doubt whether the order of the Lord Chancellor can be deemed an expression of his opinion that Mr. Fitzgerald was not qualified to discharge the duties of the office. The order does not state that that was his opinion; and I have always thought that where a qualified authority is vested in an individual by statute, no matter how high his station may be, his act, purporting to be done under that authority, should upon its face state the facts which entitle him to do it. Further, I have grave doubts whether, as a matter of fact, the Lord Chancellor ever formed such an opinion, or at all considered the qualifications of Mr. Fitzgerald; but these are matters which can only be regularly determined upon the trial of the information.

(2) As to the delay, the circumstances of the case, the change of opinion of the executive government, the fact that the legal advisers of the Crown considered that the case was a *casus omissus* from the Act, the action in Parliament taken by them to have that *casus omissus* supplied—all afford, in my opinion, a reasonable excuse for the delay, having regard to Mr. Fitzgerald's claim to the office and his challenge of Mr. Wright's title having been practically contemporaneous with the appointment of the latter.

(3) The last topic referred to by the defendant's counsel affects me in a wholly different way from that in which he relied upon it. The refusal, upon any of the grounds last suggested, to permit this information to be filed, will not validate the defendant's title; and having regard to the opinion I have formed upon the point of substance in the case, I view with dismay a further continuance of the state of facts which at present exists, and which, in my opinion, gravely affects the title to registered lands in the West Riding of the county of Cork. This is not the proper place to determine the

effect of the use of the official seal of the local registering authority; but if I be right in thinking that the local registering authority which at present has its office in Cork has no jurisdiction as to lands in the West Riding, any more than it has as to lands in the adjoining county of Kerry, no judicial notice of the official seal can cure the defect. I think this is more a reason for granting the order than for refusing it.

We should, therefore, in my opinion, give leave to file the information; the reasons for impeaching the defendant's title should be amended in the manner asked by Mr. Ronan; and the costs of this motion should abide the result of the judgment upon the information.

ANDREWS and BOYD, JJ., concurred.

Solicitors for the relator: *J. J. O'Meara & Co.*
Solicitors for the defendant: *Wynne & Wynne.*

J. L.

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May 12.

THE ATTORNEY-GENERAL *v.* THE EARL OF LONGFORD (1).

(1907. No. 215.)

Inland Revenue—Determination or expiration of lease—Succession duty on the increased value of lands demised—"Lease purporting at the date thereof to be a lease at rack-rent"—Lease for ninety-nine years at a fixed rent—Covenant by lessee to expend a specified sum in building on the demised premises within a specified time—Proviso that, on breach of such covenant, the lease should be void, and that the lessee should hold the demised premises for a term of twenty-one years from the date of the demise, the rent remaining unchanged.

Portions of undeveloped land adaptable as sites for villa residences were let in lots on leases for ninety-nine years. Each lease reserved a fixed sum as rent, and contained a covenant by the lessee to expend a specified sum in building on the demised premises within five years from the date of the demise. Each lease also contained a proviso that on breach of the aforesaid covenant the lease should become void, and that, in such case, the lessee should hold the demised premises for twenty-one years from the date of the demise, the rent remaining unchanged.

The covenants having been performed, and the lands having been held by the lessees for the full term of ninety-nine years, on information by the Attorney-General for a declaration that, upon the expiration of the leases in question, the successor of the lessor was bound to deliver a succession account, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51):—

Held, by the King's Bench Division, that the leases were not "leases purporting at the date thereof to be leases at a rack-rent" within the meaning of section 20 of the said Act, and that the successor of the lessor was bound to deliver an account, and to pay the duty imposed by the said Act.

INFORMATION by the Attorney-General for Ireland to obtain a declaration that the defendant was bound to deliver a succession

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

account under 16 & 17 Vict. c. 51, and to pay duty thereon at the rate of £3 per cent. in respect of the increased value of certain lands, the property of the defendant, accruing upon the determination of certain indentures of lease.

All the leases to which the information related, save two, were dated May 1st, 1804, the remaining two being dated March 26th, 1806.

On May 1st, 1804, certain lands situated in the neighbourhood of Kingstown, then known as Dunleary, and of Monkstown, in the county of Dublin, stood limited as to one undivided moiety thereof, under an indenture of August 25th, 1800, to the use of the Right Honourable Thomas, first Viscount de Vesci, and his assigns, during his life, with remainder to the Right Honourable John, second Viscount de Vesci, then the Honourable John Vesey, and his heirs; and as to the other undivided moiety thereof to the use of the Right Honourable Thomas, Second Earl of Longford, and his heirs.

By the said indenture of August 25th, 1800, the said Thomas, Viscount de Vesci, was empowered to grant leases of the settled lands for any term of years, or for a life or lives, with or without a concurrent term of years, at the best and most improved yearly rent which could reasonably be obtained.

In the year 1804 certain portions of the said lands were demised to certain lessees in lots, a lease of one undivided moiety of each lot being made by the said Thomas, Earl of Longford, and a lease of the other undivided moiety being made by the said Thomas, first Viscount de Vesci, and the said John, second Viscount de Vesci, then the Honourable John Vesey. These leases all bore date May 1st, 1804, and were made for terms of ninety-nine years, or, in some cases, for three lives, or ninety-nine years. The rent reserved by each of the leases was a fixed sum payable during the whole currency of the terms thereby created. Each lease contained a covenant by the lessee to expend within a specified term a certain sum in a "building or buildings," and in every lease this covenant was subject to the following proviso:—

"Provided always, and the said premises are hereby so as aforesaid demised to the said lessee upon this express con-

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dition that if the said lessee, his executors, administrators, or assigns, shall not within the space of five (1) years, to be computed from the first day of May then instant, lay out and expend as aforesaid in a building or buildings, upon the said premises, or some part thereof, according to the true intent and meaning of these presents, then this present demise, and the estate, interest, and term thereby created shall immediately cease, determine, and be void upon the expiration of such term of five years. And the said lessee, his executors, administrators, and assigns, shall in that case hold, occupy, possess, and enjoy the premises for a term of twenty-one years, to be computed from the said first day of May, anything herein contained to the contrary in anywise notwithstanding." This proviso did not effect any alteration in the amount of rent, which remained the same as that reserved during the currency of the full term of the lease. The leases also contained a covenant by the lessee for himself, his heirs, executors, administrators, and assigns, to maintain, repair, and keep the demised premises, and "all houses, edifices, buildings, trees, fences, plantations, enclosures, and improvements whatsoever, made, or to be made thereon, in good, sufficient, and tenantable order, repair, and condition."

Thomas, first Viscount de Vesci, died prior to 1806, and the above-mentioned leases of March 26th, 1806, were, as to the de Vesci moiety of the said lands, made by John, second Viscount de Vesci, alone. The terms, covenants to build, provisos, and other incidents of these leases were identical with those of the earlier leases of May 1st, 1804.

The rents reserved by the said leases, if calculated as a rent per acre, varied in amount from £11 8*s.* to £5 10*s.* per Irish acre. The sums which were to be expended by the lessees on buildings varied in amount from £1000 in one case to £250 in another, *e.g.*, in one case a lot comprising 10 acres and 10 perches was demised for a term of three lives, or ninety-nine years, at a rent of £100 12*s.* 6*d.*, with a covenant to expend £1000 on buildings; in another, a lot of 22 acres and 30 perches was demised for a similar term, at a rent of £126 3*s.* 9*d.*, with a covenant to expend

(1) So in all the leases save two, in which the term was seven years.—[REP.]

£500 on buildings; and in a third case, 11 acres 1 rood and 11 perches were demised for ninety-nine years at a rent of £64 7*s.* 4*d.*, with a covenant to expend £300 on buildings. An estate map of the lands in question, made in 1792, on which was written—"Beautiful sites for building," and a book of maps made in 1803, apparently for the purpose of the leases of 1804, were put in evidence.

Certain evidence by the present agent of the estate was given; but as the judgment of the Court is based on other and distinct grounds, it is unnecessary to report this evidence.

The Attorney-General (*The Right Hon. R. R. Cherry, K.C.*) (with him *The Solicitor-General* (*Redmond J. Barry, K.C.*) and *Coll*), in support of the information:—

The only question in this case is, whether the leases enumerated in the schedule to the information are within the proviso of section 20 of 16 & 17 Vict. c. 51: in other words, are they leases "purporting at the date thereof to be leases at a rack-rent"?

A rack-rent means "a rent of the full value of the tenement or near it" (1). In "Stroud's Judicial Dictionary" it is defined as a rent of or approaching to the full annual value of the property out of which it issues, "annual value" in this instance meaning "gross rental as distinguished from net annual value"; a lease for which a fine is paid is not a lease at a rack-rent within the meaning of the proviso in section 20, and I submit that the same reason will exclude a building-lease from the benefit of the proviso. A covenant to build is part of the consideration given by the tenant for the lease, and, in the absence of a stipulation to the contrary, where there is a proviso for the determination of the lease on breach of the covenant to build, the landlord can recover damages for breach of the covenant: *Marshall* v. *Mackintosh* (2); *Ex parte Newitt*; *In re Garrud* (3).

(1) Blackstone's Commentaries, vol. ii., page 43.
(2) 78 L. T. (N. S.) 750. (3) 16 Ch. Div. 522, at p. 529.

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Serjeant O'Connor, K.C., and *Ronan, K.C.* (with them *Poole*), for the defendant:—

The question whether the rents reserved by these leases are or are not rack-rents within the meaning of section 20 of 16 & 17 Vict. c. 51, must be determined by reference to the circumstances in existence at the date when the leases were made. There were then no buildings on the lands, and the rents reserved varied from £5 10*s.* to £11 8*s.* per Irish acre, which must have been the full annual value of the lands as they then stood. If there had been no covenants to build and no alternative term in these leases, the ordinary presumption that the rents were the best obtainable would have applied. The burden of showing that duty is payable on the determination of these leases is on the Crown, and the statute must be construed strictly as against the Crown and in favour of the subject: *Partington* v. *The Attorney-General* (1); but there is nothing in these leases to show that the rent reserved was not a rack-rent at the date when the leases were made. The fact that, in the event of a breach of the covenant to build, the term was altered, but not the rent, points to the conclusion that the rent was regarded as the full value of the land if used for purposes other than a building site. The existence in a lease of a covenant to build does not *per se* prove that the rent reserved thereby is less than a rack-rent. "An expenditure on improvements is not like a fine paid. A man may be willing to give the best rent, and yet to improve the estate; but if he were willing to give the rack-rent and a fine besides, he would no doubt increase the rent if the fine were remitted": Sugden on Powers, p. 780. In the course of the argument in *Price* v. *Assheton* (2), Lord Lyndhurst, C.B., said: "If it be worth the tenant's while to pay rent, and also to make improvements, it shows that the rent taken by the landlord is not (according to the terms of the power) the most improved rent"; but in delivering judgment, he appears to have altered his opinion, for he then said:—"*Prima facie*, a rent so reserved is not an improved rent; but here it was stipulated that the improvements should be made by the tenant, in consideration of the new

(1) L. R. 4 H. L. 100, at p. 122.

(2) 1 Y. & C. (Ex.) 82.

lease. It is difficult, therefore, to say, whether that can be considered as an infringement of the power." In *Shannon* v. *Broadstreet* (1) Lord Redesdale expressed the opinion that a covenant by a lessee to expend money on improvements is not inconsistent with the exercise of a power to lease at the best improved yearly rent and without taking a fine: see his judgment at pages 61 and 72 of the report; see also *Doe* d. *Lawton* v. *Radcliffe* (2). These authorities are cited and adopted in Platt on Leases, vol. i., p. 486.

The Solicitor-General, in reply:—

The statute 16 & 17 Vict. c. 51, s. 20, throws on the defendant the onus of showing that the leases in question are leases purporting to be at a rack-rent. Purporting means tending to show: Johnson's Dictionary; and there is nothing in these leases which tends to show that the rents reserved thereby were rack-rents. The authorities cited by the other side indicate that a covenant to expend money on improvements was regarded as raising a suspicion that the rent reserved was not the best obtainable, though there might be evidence in particular cases to show that the amount of rent was fixed without regard to the covenant. The point, however, did not arise in *Price* v. *Assheton* (3) nor in *Shannon* v. *Broadstreet* (1). These cases were decided on other grounds, and the observations which have been cited are merely *dicta*. Irrespective of the question as to onus of proof, the essential condition to bring a lease within the proviso of section 20 is that the terms of the lease should show that it was made at a rack-rent; if there is anything in the lease which leaves that question in doubt, then the proviso does not apply.

Rack-rent in section 20 means rack-rent during the currency of the term created by the lease; and in the present case it was in the contemplation of both lessor and lessee, when the lease was made, that valuable buildings should be erected within a limited time; the rent was fixed upon that basis; but it cannot be contended that the rent, regarded as a rent both for the lands and

(1) 1 Sch. & Lef. 52. (2) 10 East, 278. (3) 1 Y. & C. (Ex.) 82.

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the buildings, would be a rack-rent. The effect of the alternative terms created by the leases is this:—The lessee was given the lands for twenty-one years in consideration of the rent, or for ninety-nine years in consideration both of the rent and of the covenant to build; but if the covenant is part of the consideration for the lease, then the rent cannot be regarded as a rack-rent: *Doe* d. *Winser* v. *Rowley* (1); Furlong, Landlord & Tenant (ed. 1845), vol. 1, p. 58, par. 51.

May 12. PALLES, C.B.:—

In my judgment the lease in question is not "a lease purporting at the date thereof to be a lease at a rack-rent," within the meaning of section 20 of 16 & 17 Vict. c. 51.

The collocation of the words "at the date thereof," as they occur in this section, appears strange, because what an instrument purports to be at its date, it continues to purport to be so long as it continues to have effect, and indeed for all time. I think those words refer to the time at which the rent is to answer the description in the section, as if the order of the words was "purporting to be a lease at a rack-rent at the date thereof"; thus excluding leases in which rents were reserved to commence from a future date. For the purpose, however, of this case, it may not be necessary to determine this question.

Rack-rent is defined by Blackstone (2) to be "a rent of the full value of the tenement, or near it." Consequently the lease in this present case, to be within the section relied on, must purport to show that the rent reserved by it is of this character. A lease can purport to show this in either of two ways; either, 1st, by stating so explicitly—a course not usual, save in leases under particular powers; or, 2ndly, by the application of the doctrine that the value of the thing is what it will bring. Thus if it appear upon the lease that the rent, *and nothing more* than the rent, is contracted to be given for the tenement, it

(1) 5 L. J. (N. S.) C. P. 290.

(2) Blackstone's Commentaries, vol. ii., p. 43.

would, in my opinion, be a lease within the section. Anything ordinarily involved in the relation of landlord and tenant would not, in my judgment, be something more than the rent, such, *e.g.*, as a covenant to keep in repair and to deliver up at the determination of the lease in good repair. Here, however, the contract is, not that the lessee shall have the land at the reserved rent, and nothing more; but that he shall have it at the reserved rent, he agreeing to expend, within a specified time, a specified sum in building upon the demised premises. This covenant is, in itself, a valuable consideration; and a lease which contains it cannot, in my judgment, purport to be at a rack-rent, unless we can say, *as matter of law*, that the existence of such a covenant does not impose an obligation on the lessee. It is said, and truly said, that such a covenant, so far from being a burthen upon, *may be* a benefit to, the lessee, as it amounts to a license to do that which otherwise might be waste. But that it *may not be* a burthen on the lessee is not sufficient. To preclude *the existence* of the covenant preventing the lease *purporting* to be at a rack-rent, it should be shown on the face of the lease that the clause could not be such a burthen.

Lastly, it is said that the clause, in its true nature, is not a covenant on which damages would be recoverable, but is part of a condition, on non-performance of which the length of the term demised is to be reduced. I do not think it necessary to consider whether this is the real effect of the clause; because, even assuming that it is not a covenant, for non-performance of which damages would be recoverable, but is a condition that, in the event of the lessee not expending within the five years the specified sum, the term should be reduced in the manner specified in the lease, then the contract was that the lessee should hold during the residue of the ninety-nine years after the expiration of the reduced term of twenty-one years, in consideration, not of the reserved rent *alone*, but of that rent *and* of the actual expenditure of the specified sum. In my judgment the fact that under the lease the expenditure should be made as a condition precedent to the right to hold during the residue of the term would prevent the lease from being one purporting to be at a rack-rent, as effectually as would the personal covenant to expend the £500.

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I do not refer to any of the numerous cases which have been cited, as, with deference to the able arguments we have heard, none of them are in point in the view which I take of the case.

The case appears to me to be a very clear one: There must be judgment for the Crown, with costs. The figures can be adjusted between the parties, and if there be any disagreement as to them, the case can be set down for further directions.

ANDREWS and JOHNSON, JJ., concurred.

Solicitor for the Inland Revenue Commissioners: *Richard Martin.*

Solicitors for Lord Longford: *S. S. & E. Reeves & Sons.*

J. C. W.

M'CARTHY *v.* FITZGERALD (1).

K. B. Div. 1909. Jan. 15, 16, 18, 19, 23.

Appeal. 1909. Feb. 18, 19, 22.

Practice—New trial—Amendment of date in particulars—Surprise—Refusal of adjournment in order to supply evidence adapted to altered date.

Where a specific date is given by a plaintiff in particulars, to which, under the circumstances of the case, the defendant may reasonably confine his evidence, an amendment of the date should not be allowed at the trial without granting (if applied for) an adjournment, to allow the defendant an opportunity of supplementing his evidence, so as to meet the case presented by the amended date.

MOTION by the defendant, that the verdict and judgment entered for the plaintiff, for £119 0*s.* 9*d.*, be set aside and judgment entered for defendant, or a new trial ordered, on the ground, *inter alia* (which is the only one with which this report is conversant), of surprise at the trial.

The action was brought for £126 11*s.* 4*d.*: £96 balance cash lent and advanced by plaintiff to defendant at his request on the 31st January, 1902, the balance, £30 11*s.* 4*d.*, for interest thereon at 5 per cent.

The particulars in the specially indorsed writ were as follows:

	£	*s.*	*d.*
"1902, Jan. 31. To cash lent and advanced by plaintiff to defendant at his request on date in margin, .	100	0	0
Interest on said sum of £100, from 31 Jan., 1902, to 1 Nov., 1902, at 5 per cent. per annum, as agreed on between plaintiff and defendant, . . .	3	15	0
Interest on £99, from 1 Nov., 1902, to 24 August, 1904, at said rate, ...	8	19	7
1908, May 12. Interest on £96, from 24 Aug., 1904, to date in margin, at said rate, as per said agreement, ...	17	16	0
	£130	11	4

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

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"1902, Nov. . By cash paid by defendant on date in margin, ... £1

1904, Aug. 24. By cash paid by defendant on date in margin to Father O'Leary, at plaintiff's request, on plaintiff's account, ... 3

£4

"Balance due, £126 11*s.* 4*d.*

"Further interest to date of payment."

The defences were traverses and the Statute of Limitations.

The case was tried before Johnson, J., and a city common jury at Dublin, on 27th and 28th October, 1908.

The plaintiff was a sister of the defendant, the only son of an old farmer in the West of Cork, who was heavily indebted. The defendant married on 11th January, 1902, a young woman, daughter of a neighbouring farmer, who had a fortune of £265. The money was handed to Mr. Fitzmaurice, solicitor, for safe keeping. According to arrangement, common in Irish cases, the defendant was to have the old father's farm, to free it from debt out of the wife's fortune, and out of an expected surplus the plaintiff was to get £100. The plaintiff, in her evidence, deposed to the defendant on some evening (the date of which she did not fix) coming back from Dunmanway, having got £245, as he said, leaving £20 with Fitzmaurice, and taking out a bundle of notes gave her £100; that he then suggested to her to re-lend him that sum to buy fresh stock for the farm, which she did, handing him back the £100. The only cash actually paid was £245 paid to Fitzmaurice, the defendant getting two cows for the balance.

The defendant's case was that, having no money at all, much less £100, except for his wife's fortune, which had been paid to Fitzmaurice, who lodged it in the bank at Dunmanway, he, on the 16th January, 1902, cashed Fitzmaurice's cheque for £245, paid away £45, and on the 21st January drew the remaining £200, all of which he paid to creditors, whose receipts were produced. The defendant was thus, apparently, in a position to establish that on the 31st January he had no money out of which to pay plaintiff the £100, which she alleged was lent back to him. The learned Judge rejected (it was admitted properly)

a document from the bank, offered on behalf of defendant, as not evidence under the Bankers Act. The defendant's case having closed, counsel for the plaintiff applied for leave to amend by substituting a date, which the learned Judge reported was not on his notes, for the 31st January, 1902, in the particulars of claim; and notwithstanding the objection of defendant's counsel, who also applied in case of any amendment for an adjournment of the trial to give him an opportunity of meeting the new case thus made, the learned Judge granted liberty to amend, and refused to adjourn. The jury found a verdict for the plaintiff for the principal amount claimed, with £4 per cent. interest, making in all £119 0*s.* 9*d.*, for which judgment was entered.

Further details of the material parts of the evidence at the trial are given in the judgments of the Lord Chief Justice and Wright, J. Upon the question of surprise, affidavits were made by the solicitors for both parties. But, though absolute credence was given to both affidavits, neither of them seems to have influenced the determination of either the King's Bench Division or the Court of Appeal—the decision proceeding mainly, if not altogether, on what admittedly occurred at the trial. So far as material these affidavits are noticed in the judgments in the King's Bench Division.

P. D. Fleming, K.C., and *W. S. Norwood*, for the defendant.

Serjeant Moriarty, K.C., and *The Hon. Cecil Atkinson*, for the plaintiff.

Jan. 23.

WRIGHT, J.:—

This is an action to recover a sum of £126 11*s.* 4*d.*, £96 thereof being claimed as balance of cash lent, and £30 11*s.* 4*d.* as interest. In the particulars on the writ of summons, the money is alleged to have been lent on the 31st January, 1902, the original loan being set out as £100, and credit given for two payments, of £1 and £3, which are relied on to take the case out of the Statute of Limitations. The defence, in addition to traverses, sets up a plea of the Statute of Limitations. The action was tried in Dublin before Mr. Justice Johnson. The trial was a protracted one, lasting for two days. A number of

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questions were left to the jury, the answers to which were in favour of the plaintiff, and a verdict was found for the plaintiff for £119 0*s.* 9*d.* The learned Judge gave judgment for the plaintiff for this amount with costs, but, on the application of Mr. Fleming, granted a stay of execution on certain terms, which involved the payment by the defendant to the plaintiff's solicitors of a sum of £40 for costs, to be repaid by them in the event of the verdict being set aside, and judgment entered for the defendant by the King's Bench Division, or a new trial ordered, and an undertaking by the defendant not to dispose of, or charge his farm. The application before us is, that the verdict and judgment be set aside, and judgment entered for the defendant, or a new trial ordered. Three grounds are relied on in the notice of motion—(1) that there was no evidence that any money was lent by the plaintiff to the defendant, on the 31st January, 1902; (2) that the verdict was against the weight of evidence; (3) surprise at the trial. The last ground is the one mainly relied on by the defendant, and is based on this :—At the close of the evidence an application was made by Serjeant Moriarty, to amend the pleadings of the plaintiff by substituting for the 31st January, the day mentioned in the particulars in the writ of summons as the date of the loan, a date which the learned Judge says is not on his notes, but which I am satisfied, for the reasons I shall afterwards mention, was the 16th January. The application was acceded to, and the amendment granted. Mr. Fleming says he was put in a certain difficulty by this, for that if that date had originally appeared he could have given documentary and official evidence to show it was impossible the money could have been lent on that day. He applied therefore for an adjournment to enable him to produce such further evidence, and offered to pay the costs of the day. The learned Judge, however, refused to adjourn the trial then. The defendant accordingly claims a new trial on the ground of surprise: in other words, he says that a favour was granted to the plaintiff at the trial practically at the expense of the defendant. This being the main ground on which a new trial is sought, I wish shortly to consider the principal facts of the case.

The plaintiff is Mrs. Julia Anne M'Carthy. The defendant is her brother. They were members of a family of three, the second

family of an old farmer; and at the end of the year 1901, the three, namely the plaintiff, then aged 23, the defendant, aged 21, and a sister named Mary Kate, aged 18, were living with their father (an old and feeble man) on the farm, neither the plaintiff nor the defendant being married at that time. It is clear that the family were then in financial difficulties. As the plaintiff says, the farm was not paying, and they took a dairyman who lived in the house. They were in debt to the bank; they were in debt to a man named Atkins, a meal merchant, and to many other persons. The creditors were becoming importunate; and it was generally considered that the only way to save the farm was to get "the young fellow," as the defendant was called, to marry, and of course to marry money. Accordingly a match was made with a young lady who was bringing in a considerable fortune, a sum of £265. The marriage settlement was executed on the 7th January, 1902. There is no doubt that the marriage took place on the 11th January. This is fixed by the evidence of both plaintiff and defendant. The date of the alleged loan was, I have said, originally given as the 31st January. I have read the affidavits of Mr. Wynne and Mr. Fitzmaurice, and I accept as absolutely truthful the statements in these affidavits. That is to say, I believe they were made with the object of telling the absolute truth. It is evident from Mr. Wynne's affidavit that there was a mistake as to the date of the 31st of January, and I think this was because the marriage was believed to have taken place on the 25th January, and not the 11th. I am satisfied that the date of the alleged loan proved at the trial was the 16th January, and no other date. The settlement, as I have said, was executed on the 7th. The money was handed to Mr. Fitzmaurice for safe-keeping, and we have the note taken by himself at the time. The £245 remained with him till the 16th. We have his cheque of that date, made out, not in favour of the old man who was to get the money, but, by his instruction, made in favour of the son, the defendant here.

I now come to the story told by the plaintiff. After referring to her brother's marriage, which had taken place on the 11th of January, she says:—"I remember my brother telling my sister and I he was going into Dunmanway to Mr. Fitzmaurice to get

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the money, £245—£20 to be left with Fitzmaurice for twelve months. Defendant's wife was living at her own place with her father. Defendant came back that evening. He and I and Mary Kate had tea, and after tea he said, 'I got the money from Mr. Fitzmaurice.' My father was in bed, and he (defendant) put his hand in his breast-pocket and took out notes and separated five notes from the rest and paid them over to me, saying, 'There is your £100.' I saw the top note was a £20 note. He kept talking about money, and I had not time to look at my notes. He said he paid £8 to shopkeepers in Dunmanway, and the balance would not make him as independent as he wished to be. That if he had more money, he could buy more stock, and keep the old stock until further opportunity for selling them. All this was after tea, and he said, 'If you'd lend me that money, it would be as good to you as if you had it in the bank, and I will pay you as good interest on it as you'd get anywhere.' He went on, it would be much easier for him to get the loan of the money from me than to go elsewhere to look for it, and that if luck found him in a few years he might make mine in a few years as much more by getting the loan of it now. I passed the money back to him and said, 'It is as well you should have it as if I had it in the bank, and, indeed, I may not want it for two or three years.' The arrangement was not put in writing. I never doubted his honour. After this defendant brought fresh stock; he made up the old building outside for the dairyman in place of his being in the dwelling-house and living there."

That is the story told by the plaintiff. The story told by her sister is practically to the same effect; so much so that I see that the learned Judge intervened during the sister's examination to ask her if she had been comparing notes with her sister about her evidence. Here is her account:—"I remember my brother going to Dunmanway to get the money by direction of my father, and I remember he returned about five or six in the evening, four or five days after the marriage. He brought the money. He sat down at the table, took a roll of notes out of his breast-pocket, and counted out five and handed them to my sister, and said, 'Here is your £100.' He began by saying he paid so-and-so, and he'd build a house for the dairyman, and let him the

cows at the other end of the farm, if my sister would lend him her £100. He spoke about the building of the house if he had the money, and you (sister) would not want it for a year or a couple of years, and if you put it in bank you would not get so much interest as you'd get anywhere." And the learned Judge adds in his report [To me: "I have not been comparing notes with my sister about my evidence. I came from London last night."]

There is the story told with great circumstantiality and detail by these two sisters. It is all denied by the defendant. It is as certain as anything can be that the date of the alleged loan is fixed by the plaintiff as the 16th January, and I consider the date very material. She says in her cross-examination: "My brother was married Sunday, 11th January. My brother went to Fitzmaurice end of following week to get the money, and returned with it while we were at tea." That does not mean the end of the week commencing the following Sunday, but the end of the week commencing that Sunday, the 11th, for on her re-examination by Serjeant Moriarty, she says, "It was either the Thursday or Friday following the marriage," that is to say, the 15th or 16th. Mary Kate says: "I remember my brother going to Dunmanway to get the money by direction of my father, and I remember he returned about five or six in the evening, four or five days after the marriage. He brought the money." And later on she says: "He (brother) left about 11 or 12 o'clock to go to Fitzmaurice's office at Dunmanway four or five days after the marriage." Mr. Fitzmaurice in his affidavit swears that the date which Serjeant Moriarty applied at the trial to substitute was the 16th January. Mr. Wynne in his affidavit states that "plaintiff swore that the defendant and his advisers knew that her case was that the loan was made four or five days after the marriage." The defendant's notice of motion for a new trial, served on the 4th November when the matter was fresh in the minds of every one, sets out as one of the grounds, "That the defendant was taken by surprise by the case made at the trial that the alleged loan was made on the 16th January, 1902, instead of the 31st January, 1902." Everything goes to show that if this transaction occurred at all, it occurred on the 16th, and I decline to listen to the suggestion that the loan may have been made on the 21st.

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This being so, I come back to the story of the plaintiff. It is not necessary for me to deal too minutely with the evidence, but it strikes me that if the father was anxious to secure the sum of £100 for the plaintiff, and £50 for the sister, he took a peculiar way of doing so. By his written authority the cheque was drawn by Mr. Fitzmaurice in favour of the defendant, and from the 16th January the defendant was *dominus* of the money—the whole £245. It is also a remarkable thing that the plaintiff left this £100 with her brother for some years. She married in the year 1904, and there is some evidence that she applied to the defendant for money to pay the wedding fees, and got £3, which money she uses to take the case out of the Statute of Limitations. The loan was concealed from the defendants' wife's people. When the plaintiff was getting married, she never told her husband that she was entitled to this £100. She never gave him to understand that she had a farthing in the world, and it was not till some months after the marriage, according to her, that he heard of the £100.

At last, in the year 1908, a claim is made. At first I thought Messrs. Blake's letters greatly against the plaintiff, but on reading them again I think they are just possibly consistent with her case, though I think they are more in favour of the defendant. The plaintiff's case being that this was a loan, she, or, what is the same thing, her husband, go to a well-known firm of solicitors in Cork, Messrs. J. C. & A. Blake, and they write to defendant on the 9th January, 1908. In that letter the theory of a loan, now set up, is conspicuous by its absence. A long correspondence followed between Messrs. Blake and Mr. Fitzmaurice, the defendant's solicitor, Mr. Fitzmaurice stating that all the money received by his client was applied in paying off pressing creditors.

Well, it having been proved by the plaintiff, and every witness who purported to give evidence on the subject, that the date of the alleged loan was the 16th January, the question is, could it possibly have occurred? The evidence of the defendant is as follows:—On the 16th January he got the cheque for £245 from Mr. Fitzmaurice, and he says he went to the Munster and Leinster Bank, and lodged £200 of the amount on deposit receipt. The balance, £45, he took the same day to Skibbereen, and paid

£32 10s. rent due, and the next day bought a horse for £4 15s.; but the £200 remained in the bank from the 16th to the 21st. If that story is true, it would have been impossible for the defendant to have handed the plaintiff £100, as she alleges, out of this money. It has been suggested that he may have had other moneys; but if anything is clear, it is that the defendant had no money except this fortune he got with his wife. The defendant, then, had to meet a case suddenly shifted from the 31st to the 16th. I read what the learned Judge says:—"Serjeant Moriarty applies for leave to amend the pleadings by substituting a date which is not on my notes for the date 31st January in the particulars of claim." It is very unfortunate that the learned Judge, who is, as a rule, so accurate, was unable to record the date: "Fleming, K.C., objects. I will amend according to the evidence. A juror says, We have not exact evidence of this." I do not take every word a juror says as inspired. If I am right, the date is fixed as accurately as can be as the 15th or 16th January.

This being the position of affairs, Mr. Fleming tendered in evidence a document which was rightly rejected by the learned Judge, since it was not a certificate under the Bankers' Books Evidence Act. It was, as Mr. Fitzmaurice states in his affidavit, a memorandum got by him with a view to verify the defendant's statement, and not with the object of being given in evidence. This document having been rejected, Mr. Fleming applied for an adjournment to enable him to call the bank manager, or other official. This application was refused. I am of opinion that the learned Judge was right in making the amendment, but wrong in refusing the application for an adjournment. The Judge at the trial ought to make every such amendment as may be necessary for the purpose of determining the real questions in controversy between the parties; but he ought not to make an amendment which puts the party against whom it is made in an unfavourable position. I am of opinion that Mr. Fleming was not in a position to meet the case raised by the amendment. Telegrams were sent by Mr. Fitzmaurice to the bank manager and the accountant at Dunmanway to attend with the bank books in Dublin; but, owing to there being a fair in Dunmanway, they were not able to attend.

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In my opinion, therefore, the defendant was not in a position to meet the new case that was allowed by the learned Judge to be made. I do not see the justice of granting a favour to one party which the other party is to pay for.

It is stated in Mr. Fitzmaurice's affidavit, and admitted in paragraph 10 of Mr. Wynne's affidavit, that Serjeant Moriarty, in his reply for the plaintiff, commented on the absence of the bank books and officials. I do not suppose it will be denied for a moment if the date had been originally given as the 16th January, the bank manager, or some other official, would have been brought up to prove the state of affairs on that date. He would have proved that the £200 was lodged on the 16th January, and remained in the bank till the 21st; and it would have followed that the story of the plaintiff, that the defendant between five and six o'clock on the evening of the 16th came in with a bundle of notes, and handed her five notes of £20 each, was untrue, because it was impossible.

I am aware that we cannot grant a new trial on the ground that the verdict was against the weight of evidence, unless the verdict was one which a jury, viewing the whole evidence reasonably, could not properly find: *Metropolitan Railway Co.* v. *Wright* (1). Here I do not know what the verdict would have been if the jury had had all the evidence before them; but evidence of a material fact, which suddenly became material, namely, what the bank account showed on the new date, was not before the jury. My decision that the verdict cannot stand proceeds, not on the ground of the weight of evidence generally, but that the defendant was excluded from giving evidence on the case newly made.

For this reason I have come to the conclusion, with great regret, that the verdict cannot stand, and that there must be a new trial. I say, with great regret, because I see that at the end of the litigation one, if not both, of the parties will be ruined.

(1) 11 App. Cas. 152.

MADDEN, J. :—

In ordinary circumstances I should content myself with saying that I entirely concur with my brother Wright, in thinking that a new trial should be granted; but as the Court is divided in opinion, and several topics have been suggested, not merely by the notice of motion, but by the able arguments to which we have listened, I think it right that I should state very shortly the grounds on which I base my judgment.

I ask myself, was the plaintiff allowed to present to the jury a case substantially different from that which the defendant came to meet? and if so, ought not the defendant, in common justice, to have been afforded, or to be now afforded, an opportunity of meeting the case so presented? This could have been done by the postponement of the trial, and an application for such postponement was made on behalf of the defendant, the usual terms being offered of paying the costs of the day; but the learned Judge did not see fit to accede to the application. It is for us to say should the opportunity which was then denied to the defendant be now afforded to him, and unfortunately, and this I deeply regret, this can only be done by granting a new trial. I have tried to see was it possible to come to a different conclusion, but after the evidence which has been very fully gone through by my brother Wright, I am unable to do so.

What was the case the plaintiff came to meet? A loan on the 31st January. I quite agree that the real question in one sense is, was there a loan or was there not? but a case may so develop itself that this can only be decided by considering a question of date, and in such case the date becomes material. Is this such a case? It seems to me that the action taken by the plaintiff's counsel shows that it is. The 31st January was the date the defendant came to meet. I am not going into the evidence; but a body of evidence, true or false, was put before the jury for the purpose of showing that this was an impossible date. The case depended on the inquiry, had the defendant the money to give—a topic of vital importance. The defendant's case was, that on the 31st the money had been all "frittered away," was, I think the expression used, in paying debts. If this was so, the

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defendant had no money on the 31st out of which the loan could have been made. Serjeant Moriarty then asked to amend to the 16th January. I am satisfied it was to the 16th, as that was the only possible date. What then was the position when the application for an adjournment was made? The learned Judge had allowed the plaintiff to put forward the case of a loan on the 16th, the defendant having come there to meet a case of a loan on the 31st, and the date being a matter of vital importance. The defendant alleged that he was in a position to show that this money, his wife's fortune, which unquestionably was realized by him on the 16th, was lodged in the bank on that day, and remained lodged until the 21st. In many cases such a circumstance would be immaterial; but here it is a cardinal question, whether this story is true or not. If it is proved—I do not say it will be proved—there is an end of the plaintiff's case. The defendant had in his possession a document that suggested that evidence to prove the truth of his story was forthcoming. When this document was tendered, it was of course rejected, since it was not legal evidence. I looked very carefully to see whether the defendant ought to have foreseen that a case might be made of a loan on the 16th, and to have come prepared with legal evidence of his bank account, and at first the existence of this document made me think that the defendant did foresee the possibility of such a case. But I accept Mr. Fitzmaurice's statement that the document was procured by him merely to test the truth of his client's story. When, therefore, this document was rejected, as it rightly was, I think that the defendant ought to have been afforded an opportunity of producing the necessary legal evidence.

I am of opinion that a new trial should be granted; and I base my judgment on this:—The defendant was only bound to meet a case of a loan on the 31st; the date was changed to the 16th; the case was one in which date was of vital importance: and it presents itself to my mind that, as a matter of common justice, the defendant ought to be afforded an opportunity of meeting the new case presented.

Lord O'Brien, L.C.J.:—

This was an action for money lent by the plaintiff to the defendant on the 31st January, 1902, and the defence was a denial that any money was lent on the day named in the writ, or *at all*. The writ was issued on the 13th May, 1908. It will therefore be seen that the transaction of the loan had taken place, if at all, some six years before action. It was an ancient, far back transaction with reference to which mere date, as to days, was not unlikely to be inaccurate. After a trial which lasted two days, a verdict was found for the plaintiff by a jury, with reference to whose conduct at the trial no impeachment whatsoever has been made. The verdict for the plaintiff, found by a jury, which it has not been asserted did not pay every possible attention to the case, and whose intelligence and desire to do right have been in no way disparaged, has been sought to be set aside on several grounds. I shall refer to the notice of motion. [His Lordship read the notice of motion.]

Now these are the various grounds of attack. As to the first ground, that there was no evidence that the money was lent on the particular day named, I attach no importance whatever to this apart from the question of surprise, which I shall deal with later. The stereotyped form of defence now-a-days is what the defendant pleaded here, that there was no money lent on the day named or *at all*; and it is by reason of this form of defence that particular dates are not fixed with great care by solicitors. I am sure in this six years old transaction it was very hard to fix a date. The particulars are often sought to be complied with by approximation. If I had to give an account of a transaction six years old, and I gave a particular date as certain, I would begin to suspect myself. No doubt if a transaction is alleged to have taken place on a festival, such as Lady Day, Patrick's Day, Christmas Day, Easter Sunday, or Good Friday, it would be different. Here it is said that according to the evidence it was some four or five days after the wedding, that would be about the 16th, and the whole of this trial is to be set aside because the plaintiff may have been four or five, or perhaps seven or eight, days wrong in a transaction six years old. The careful pleading shows that the defendant's very

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learned advisers knew of course that mere date was not of the essence of the case; when I come to the ground of attack founded on alleged surprise, I will recur to this topic in reference to which exclusively it has any real bearing. As to another ground, that there was on the part of the learned Judge non-direction, as it has been styled, I see not a shadow of justification for this allegation. He may have refused a belated application for adjournment, but this most certainly was not non-direction.

But I come now to a ground which opens up the general character of the case, namely, that the verdict was against evidence and the weight of evidence; and it becomes necessary to examine the facts. A small farmer named Richard Fitzgerald, who lived near Dunmanway in the county of Cork, had married twice. He had several children, eight by the first wife, and three by the second. The children by the first marriage seem to have been provided for, and it is with the second family—three in all—Julia, the plaintiff, Matthew, the defendant, and Mary Kate, the youngest, we are concerned. There were debts due, and though I think the amount was not ascertained, I take it that the debts amounted to a substantial sum. It was proposed that the son should get married; and the son's (the defendant's) case is that it was agreed that the wife's fortune, *all of it*, it should be applied in payment of the debts; that this was a contractual arrangement—that he said he would marry on no other terms—and that this was agreed to. As far as I can see, as I have already said, there was no distinct ascertainment of the amount of the debts. At this time the plaintiff, the eldest member of the family, was about twenty-three years of age, and up to the time of the marriage had done all the business of the household. The defendant was about twenty-one, and Mary Kate, the youngest, about eighteen. The father was an infirm old man, somewhere about ninety years of age. He was very old and very infirm. Well, what takes place? A marriage agreement is come to, and in that agreement, as written, it was provided that the fortune, the very substantial sum of £265, should be paid over to the old man. The defendant, the son, professed to have been very determined that the fortune, all of it, should be applied in payment of the debts of the farm; of the debts, perhaps I should say, for which the father, the house-

hold, was liable; and keen and tenacious and determined as the defendant professed to have been, there is not a syllable to this effect in the marriage contract. The contract provides that the father should be allowed to reside in the house, and be supported, and get, I believe, £5 a year, but not a syllable is said as to any provision or agreement that the fortune should be applied exclusively in payment of debts. The defendant says the agreement as to payment of debts was not told to Fitzmaurice. Fitzmaurice says: "I do not remember the father gave any reason for my holding the £245 to his order. He was old, and could not come into Dunmanway again conveniently; and he gave me money to hold for him, and to pay it on his authority." Of course the defendant afterwards got possession of the money, because the father was so infirm that he could not come into Dunmanway: see Blake's first letter to Fitzmaurice. The usual and natural course is pursued. The money is handed over to the father, and the son gets the farm and the stock, a very considerable amount of stock. Whether the place, the father, was in debt or not, it was natural that the boy should get married. The father was very old and died shortly afterwards—a fact (his death) that may account for what the jury thought was the false case made by the defendant. I do not know whether the parish priest was dead at the time of the trial or not. The jury may well have thought that if the father had not died the son would not have dared to make the case he did.

But let me proceed. When was it arranged, according to the defendant, that the defendant should not take the farm except free from debt? Free from debt is a somewhat ambiguous statement, but I think it is clear that the defendant meant by this that the whole of the fortune was to be applied in payment of the debts. Now I give the *ipsissima verba* of the defendant. They are to be found in his cross-examination by Serjeant Moriarty. He said: "My father was anxious that Julia should have £100 at the time I was getting married. He was still anxious. I refused to take the farm except free from debt. This was arranged between my father and me. *I do not recollect anyone else was present.*" I ask, might not a jury of twelve reasonable men not believe him? A juror might very reasonably not have a particle of hesitation in

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refusing to attach any credence to the account of what was alleged to have taken place at this mysterious secret interview. Here on the defendant's own admission the father was anxious that the eldest girl, who was of a marriageable age, and had done all the business of the house, should get £100; but, according to the plaintiff, at this secret interview the bonds of natural affection were torn asunder, and a deserving daughter, who was subject to no reproach, was flung upon the world penniless. He was to have the farm and some twelve or thirteen cows and the whole fortune—the substantial sum of £265—and the deserving daughter, who was of marriageable age, was to be "let down the wind to prey at fortune." It was not then arranged that the girls should be supported in any way. There was a meagre provision for the father; but the day that the marriage settlement was executed the daughters might be flung into the street, according to the contention of the defendant. See also what Mrs. Grace says: there was a controversy as to whether the fortune was to be £80 or £100—not that there was to be no fortune. Her evidence shows that the plaintiff was asking for her fortune. She reproached him for acting as he did about the fortune. The plaintiff appealed to the parish priest, Father O'Leary. Would she appeal to him if she was telling a falsehood? These country girls do not tell lies to their priests.

But why have I gone into all this before I come to the crucial occasion when the money was said to be lent? I have surveyed the position to show that in everything the defendant said up to that occasion a jury would be amply justified, twelve men might reasonably have been of opinion, that in the antecedent matter the plaintiff was telling the truth, and the defendant was endeavouring to maintain what was not a fact—to make a false case. Looking back upon what occurred, the jury might say this is a wholly unreliable man.

Now I come to the transaction of the lending. Let me ask, why should the plaintiff invent the story she told? Would not any ordinary girl believe that what was arranged as to her fortune would be enough to establish her right to enforce it? Why invent the story about the giving, and giving back, of the £100. It is not suggested that any solicitor was so lost to decency as to

make this suggestion. Having regard to the character and circumstantiality of her story, everything she said must be carefully read. It appears to me that the bringing of the money that evening and the offer of it to the plaintiff were antecedently probable, and a jury might well have thought so. I must read that portion of the plaintiff's evidence that relates to the loan :—

"A few days afterwards the marriage between my brother and Miss Daly took place. I remember my brother telling my sister and I he was going into Dunmanway to Mr. Fitzmaurice to get the money, £240—£25 to be left with Fitzmaurice for twelve months. Defendant's wife was living at her own place with her father. Defendant came back that evening; he and I and Mary Kate had tea, and after tea he said, 'I got the money from Mr. Fitzmaurice.'" Now defendant's case is, there is not a word of truth in all this—it is pure invention. "My father was in bed, and he (defendant) put his hand in his breast-pocket and took out notes, and separated five notes from the rest, and paid them over to me, saying, 'There is your £100.' I saw the top note was a £20 note." She does not say she saw any of the other notes—only the top note. If that is an invention, it is certainly a stroke of genius. "He kept talking about money, and I had not time to look at my notes. He said he paid £8 to shopkeepers in Dunmanway, and the balance would not make him as independent as he wished to be; that if he had more money, he could buy more stock and keep the old stock until further opportunity for selling them. All this was after tea, and he said, 'If you'd lend me that money, it would be as good to you as if you had it in the bank; and I will pay you as good interest on it as you'd get anywhere.' He went on—it would be much easier for him to get the loan of the money from me than to go elsewhere to look for it, and that if luck found him in a few years, he might make mine in a few years as much more by getting the loan of it now. I passed the money back to him and said, 'It is as well you should have it as if I had it in the bank; and, indeed, I may not want it for two or three years.' The arrangement was not put in writing. I never doubted his honour. After this defendant bought fresh stock; he made up the old building outside for the dairyman, in place of his being in the dwelling-house and living there. My

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sister and I were to stay till I made a home of my own, and I did work there till I made a home of my own. I got £1 from him. I cannot give the exact date. I was going to some friends in Skibbereen, and I asked him for some of my money about the middle of November following the marriage in 1902. I said, 'Young fellow' (his pet name in the family), 'I'll want some of my money next week.' He said, 'How much?' I said, 'A couple of pounds.' He said he'd have it, but next week I found he was not giving it, and I asked him if he had it. He said he was rather short of money just now, but he'd be getting money from the creamery, and would let me have £1 on Monday, and if I wanted more he could send it on. He gave me the £1 on Tuesday morning, and I went to Skibbereen that day. After I came back from Skibbereen on several occasions I asked him for my money. 'I wanted new clothes,' &c. His reply would be, 'I am very short of it' (money) 'now,' and 'his wife would know he was giving away money.' Mary Kate was present and heard me asking him for money to go to Skibbereen. I went to Father O'Leary to get him to write to the defendant for my money after I came from Skibbereen about May. I don't know did he write on another occasion. I told my brother I was thinking of going to America; he said he would find it very hard to get me my money, and would find it hard to have it for me, but would get it for me and not let his wife know he was owing me money. Near the 25th August, 1904, about a week before, I said to defendant, 'I suppose you know I am getting married?—(My father died in the winter of 1903)—and I would want some of my money.' He said, 'Yes.' I said, 'You are my only brother at home, and it would be your place to go to the priest and arrange what the marriage fee would be.' He said he would, and he said, 'I can hardly get that much money for you now, and would I' (witness) 'be asking Ellen Grace to lend me' (witness) 'the money now, and he' (defendant) 'would pay it when money would be more plentiful, and he would pay her.' I was angry and said, 'Certainly I won't ask Mrs. Grace, and if you don't get it I'll go to your wife and tell her of the money owing to me, and I am sure she will pay it; and if she had known of that money being owing me before, I am sure she'd have given it to me.' He told

me the fee would be £7, and I understood from him that he had paid that; but I afterwards found out he paid only £3, and £4 owing. I married my husband, a respectable man living in Cork. I went to Mr. Blake, the attorney, and got him to write to the defendant." [Letter, 9th January, 1908, Blake to defendant, and reply, 14th January, read and entered.] "After my marriage, seven or eight months, my brother came to Cork on business, and came to our house. I had an interview with him the evening before he went home about my money and Mary Kate. I said, 'I suppose you know I'm expecting trouble?' (confinement), and he said, 'You'll get over it all right.' I said, 'I may not see you till it's all over, and I'd like to come to a last understanding with you about my money.' He said (in effect), 'For God's sake don't speak of it now. I'm not sure about my land, and things are not going very well there, and you will be all right, and if I had the land once settled I could make some arrangement for you.' I said, 'All right, but if I don't come well out of it, will you act straight about my money and see after Mary Kate, as she will have nobody else to depend on?' He said, 'Oh, indeed, you may be sure I will.' I got well and went to Mr. Wynne (solicitor) and he wrote [letter, 25th May, read and entered]. Except the £1 and £3, nothing was paid; he told me he paid the priest £3."

Now, I ask, was all this invented? Was the conversation about her approaching confinement all invented? There was then no question as to paying a marriage fee to the priest. She was approaching child-birth—a time these countrywomen do not select for falsehood. Was the statement as to what he said about concealing matters from the wife's family a lie? Was her story, with all its circumstantiality and detail, invented? If it were, she must have been, indeed, an artist in fabrication. But, above all, and beyond all, it must be remembered that the jury, upon whose conduct no reproach is made, saw and heard the witnesses. Lord Justice Christian, comparing the Common Law with the Equity procedure, said that mere affidavits were often but the machinery of fraud; the tribunal does not see and hear the witnesses. And Lord Westbury said, in *Gray* v. *Turnbull* (1), that "when a ques-

(1) L. R. 2 H. L. (Sc.) 53.

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tion of fact has once been decided by the verdict of a jury, it requires an overwhelming case of error by the jury, or the disregard of some cardinal rule of law, to induce the Court to grant a new trial." The rule now acted upon is that the verdict should not be set aside as against the weight of evidence, unless the Court is satisfied that no twelve men might reasonably find the verdict.

But is the plaintiff's story corroborated? Was it plainly corroborated? It is not denied that cows were bought, and the house built or repaired—the very things she stated that the defendant said upon the occasion of the loan he would do. The plaintiff is corroborated by her sister, and to a considerable extent by Mrs. Grace.

Why have I gone into all this at such length? My brethren are of opinion, as I understand them, that there is no case made for setting aside the verdict as being against the weight of evidence. I think there is no case whatever made to justify such a course. Why then deal with this part of the case at so much length? My answer is, to show that when the application for an adjournment was made the defendant was hopelessly beaten. The Judge's marginal note as to the application for an adjournment is as follows:—"It is not on my note, but I rather think an adjournment of the trial was asked for on behalf of the defendant. Serjeant Moriarty for plaintiff objected, and I refused to adjourn the trial then." The case was practically over, at least so far as related to the evidence; and are we to take it upon ourselves to review the action of the Judge upon the question of time? If an adjournment was granted at the moment it was asked for, the case would be made to depend entirely on a question of time. I do not say it is impossible for us to review the action of the Judge; but what had taken place, and what might be the result of an adjournment? Beyond all question, the defendant knew well that the claim made was arising out of the wife's fortune. Particulars of the payment of this fortune had been asked—had been more than once pressed for by Messrs. Blake: see the correspondence. They pressed for vouchers for this over and over again. And the defendant should have come into Court with a detailed history of the application of that

money. If the defendant's case was that the fortune was to be applicable to the payment of debts, he should have been elaborately prepared as to application—when and how it was applied. The time and the manner of its application should be made manifest; where it was from time to time; and how he applied it from time to time. But does not the certificate which was got show that it was known that the application of the money, of the fortune, would be inquired into? It commences in the most formal manner, "I certify," and it was read to the jury, and commented on by Mr. Fleming. But what took place at the trial? I really think that Mr. Wynne, in his affidavit, gives an effective account of this. But, independent of Mr. Wynne's graphic description, let me investigate the matter my own way. The particulars put the date of the loan as the 31st January. I own I think it unlikely that the defendant had the large sum of £100 to lend, independent of what he got as the fortune. Was it not of the very essence of his case—of the case he was attempting to make—to show that the fortune was otherwise applied before that date? and should he not come to the trial with an elaborate account of the money from the time he got it till the day of the alleged payment, the 31st January? He should have come prepared to show he had traced the history of the money in all the steps and stages of its history; where it was, and how he applied it, from the moment he got the fortune till the alleged day of payment. And I wish to call attention to the fact that there is no affidavit at all by the defendant, nor a line of evidence by him that he did not think the application of the fortune, its entire history from first to last, was not to be investigated. The manifest exigency of his case was to trace the money in minute detail all through, from the time he got it until the 31st January. He persistently refused to give any adequate reply to Messrs. Blake's repeated requests for an account of the application of the fortune; and if he did not know that all this would be gone into at the trial, and the history of the fortune through all its phases be exhaustively examined into, he must have been a very simple person indeed. And it must be remembered that it was by reason of the document not being (having regard to its form) admissible—a mistake due to the defendant—that the history of

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the fortune from evidence by the Bank was not formally proved. Not that it was not anticipated that the whole history of the money as to time, place, amount, and application would be investigated. What is sought to be done was merely the supplementing of evidence. The defendant had given his evidence; his wife's sister had given her evidence; the defendant's solicitor had given his evidence; and the document which was rejected had been read and commented on to the jury by Mr. Fleming, no doubt, with his usual laudable insistence. He must have thought it legal evidence when he used it so insistently, as described—reading it to the jury. No doubt, the Judge rejected it in the end, and it would be a judicial misdemeanour on my part even to hint that an impression remained as to the contents of the document insisted upon by Mr. Fleming. But, after all, the jury were twelve human beings. It was not at all necessary that the manager of the Bank or his official should attend. The document which was read over and over again would have been quite enough, if formally right; and notwithstanding its being, strictly speaking, informal, it had been, as I have said, read and commented upon with much insistence.

But let me see what took place at the time permission was given to amend. The learned Judge reports that Serjeant Moriarty applied for liberty to amend, "by substituting a date which is not on my notes for a date (31st January) in the particulars of claim." Mr. Fleming objected. The Judge said he would amend according to the evidence. Now, mark what a juror said—"*We have not exact evidence of this.*" The juror's remark was noted by the learned Judge, and is reported to us by him. Does not this statement show that they came to the conclusion that the plaintiff had not pledged herself, as a matter of accuracy, to any particular day: that she left the date somewhat at large? The jury thought, as I most certainly think, that in a six years old transaction a mistake might be honestly made as to date, and that mistake as to date was not, under all the circumstances, a material determining factor in the case. The Judge does not state to us that he gave liberty to amend as to any particular day, and we must not be more particular than the Judge tells us he was. The one thing I have strenuously and consistently opposed

is going in any way outside the Judge's report; but it will be remarked that the learned Judge states that, though he gave liberty to amend according to the evidence, he stated he would put to the jury the question—loan, or no loan. Was the loan made "at all"?—words used in the defence. But what would be the result of setting aside the verdict? Would there not be a very great risk of a very palpable miscarriage? Might not the whole question be made to turn on a matter of date, when date has nothing to say to the essence of the case? It is recognized by the form of the defence as not of the essence of the defence. The words are that no money was lent on the 31st January, or *at all*. *At all*—this is the defence pleaded; and when the true issue has been fought out before a jury, who had been subject to no impeachment, and their verdict not detracted from by a single word of disapproval by the Judge, the case is sent back on a question of date. A six years old transaction to be reinvestigated at immense expense, involving, perhaps, ruin to both parties on a question of date. The first question, I dare say, in cross-examination of the plaintiff on a second trial would be, Did you not say the payment was on the 16th January? when, as it is proved, a sensible juror remarked, We have no exact evidence as to date. But, apart from all special pleading and over-critical analysis as to the precise date, and application of counsel to amend, what Judge and jury evidently thought was that no very exact date was given, or could really be given, with reference to this six years old transaction, and that the truth and justice of the case was with the plaintiff; that under all the circumstances the case could be adequately and properly tried on the issue left to them by the learned Judge: and I am quite sure that the fact of a question having been raised as to date made them deal with the general question the more carefully. What would be the effect, supposing the case went down again? Would there not be extreme danger of an absolute miscarriage of justice? Would not the jury be led to believe that everything depended on date, when the true question was, Was the money lent at all?

Just a few observations before I conclude. It has been said that the plaintiff did not tell her husband of this loan before her marriage. This circumstance was referred to at the trial in im-

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peachment of her veracity. But what did she say? She admitted that she did not do so—an admission that, in my opinion, told in her favour, for it was evidence of her general veracity. It is a very curious thing how the same fact influences different minds differently. I think this matter, having regard to the plaintiff's admission, tends considerably in favour of her general veracity. The question was asked her on cross-examination. She saw it was against her; and, nevertheless, she admitted she did not tell her husband before marriage. In my opinion, that, as I have said, tends in favour of her general veracity. Why did she not tell him? The defendant pressed her not to let the family know about the transaction; and if her husband had known, the murder, so to speak, would have been out. However, the jury had all this before them. The fact, however, of the defendant pressing the plaintiff to conceal matter from his wife's family is not without significance. If he deceived the wife's family in any way, it would be a reason for false swearing. It is to be remembered also that the father was dead, and, I dare say, the parish priest. If they were alive, he might not have had the hardihood to make the case he did make.

As to the Blake correspondence—the first letter of it—none of us, on consideration, attach any real weight to its frame and language as against the plaintiff. For my own part, I think that letter confirms plaintiff's case.

As to this man, Atkins, I always thought there was a considerable sum due to him. £110 was paid. Of course, he was pressing for this large sum; and whether the money was given back to the defendant on the 21st, as is alleged, or on some other day, he would take a run across the country, and pay back Atkins. But all this was before the jury.

In my judgment, this verdict should not be set aside.

J. G. T.

The plaintiff appealed (1).

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Feb. 18, 19, 22.

Serjeant Moriarty, K.C., and *The Hon. Cecil Atkinson*, for the plaintiff.

[Counsel dealt at considerable length with the evidence, and their arguments were mainly conversant with the weight of evidence, one of the grounds relied on in the motion for a new trial. On the question of amendment, they contended—1. That being consistent with the evidence, it was clearly within the discretion of the Judge at the trial; 2, that upon the issues arising on the pleadings the defendant should have been prepared with evidence to rebut proof of a loan at any time.]

P. D. Fleming, K.C., and *Norwood*, for the respondent, were not called on.

THE LORD CHANCELLOR:—

The case has been so fully discussed in the argument of Serjeant Moriarty and Mr. Atkinson, that we are now able to give our decision without calling on the respondent's counsel.

We are of opinion that a new trial must be granted, but on the condition, which we impose, that the case is to be tried in the city of Cork.

I am not going to express an opinion as to whether the verdict was one which twelve reasonable men might not have found. I decide the case upon another ground. The plaintiff brought an action for cash lent on the 31st January, 1902, and this date is given in the endorsement on the specially endorsed writ and in the particulars. The defendant's case was, that he got no loan from his sister (the plaintiff), and the case of the plaintiff was that the defendant, out of his wife's fortune, which was to be paid to his father, paid the plaintiff by direction of his father a sum of £100, which she at his request re-lent to him. The date of the 31st was a material one, and the defendant, no doubt, came to trial prepared to show generally that no such

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

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The Lord Chancellor.

loan could have been made on the 31st, inasmuch as he could prove that the entire of the wife's fortune had been paid by the defendant to creditors of his father on the 21st. This he proved generally, and this was sufficient to get rid of a loan on the 31st. When Mr. Norwood, junior counsel for the defendant, was addressing the jury, after the evidence on both sides had closed, and was commenting on the impossibility of a loan on the 31st, Serjeant Moriarty applied to amend the statement of claim and particulars by substituting a date, in accordance with the evidence, as the date of the loan, instead of the 31st. The learned Judge allowed the amendment to be made, and the 31st January vanished out of the case. Mr. Fleming leading counsel for the defendant, asked for an adjournment in order to meet the case, then for the first time presented, of another date, but his application was refused.

The only other dates were the 16th or the 21st. It could not be the 16th, as the defendant did not get the money till the 21st out of the Bank.

My opinion is, that the defendant was taken at a great disadvantage. Though prepared with evidence to demolish the theory of any loan on the 31st January, he was not prepared to meet the question of a loan on the 21st of January, a date which the plaintiff was allowed as a favour to put forward; and proceeding with the trial on the basis that this was the date, could not be without great disadvantage to the defendant. He might have called all the persons to whom he paid money on the 21st, and fixed the date and hour of payment, and shown he had no £100 to give plaintiff at the time of the alleged loan. I do not think it was a case of surprise in the ordinary sense of the term. But when the 21st became the material date, I think an adjournment should have been granted. The plaintiff's evidence as to the loan is that the defendant, on some day in January, 1902, came back from Dunmanway, in the evening, and had tea with her and Mary Kate. The hour is fixed by Mary Kate as 5 or 6 o'clock, and then the loan was made. He proves by the pass-book of Atkins, and the receipts of Connolly, Fitzgerald, and Bernard, that on the 21st January he paid £135 19*s.* 7*d.* out of the moneys drawn from the Bank. The suggestion is, he might have gone back to

Dunmanway after the loan, and made the payments; but when the favour of an amendment was granted to plaintiff, I think Mr. Fleming was entitled to an adjournment (and he offered to pay the costs incidental to this), in order to enable him to show the altered date did not make the plaintiff's case better. Therefore I think there must be a new trial, a result which I regret.

FITZ GIBBON, L.J. :—

It is a good many years since I first expressed my opinion that a verdict ought not to be set aside on the vague ground that "the trial was unsatisfactory," unless the cause of its being so could be so defined as to come within some one of the recognized grounds of objection; such as being "against evidence" or "surprise," or that the true issue was not tried. I wish to say why I hold that the verdict in the present case cannot stand. In my opinion, the defendant was suddenly placed at an unexpected disadvantage, and he was, in that sense, taken by "surprise," with the result that the evidence with which he was prepared lost the weight and completeness which it would have had but for the change of the issue *by the plaintiff*, when, at the trial, the 31st January, the date originally given as that of the alleged loan, was altered to some other date which is unfortunately left unfixed. The change was made because the defendant's evidence appeared to prove that the loan could not have been made on the date first alleged. The defendant had come prepared specifically to meet the original issue—namely, whether the loan was made on the 31st January, by proving that he then had not the money. No doubt, in order to get a verdict, he had to prove that he had not borrowed it "at all." But the change of the date utterly changed the issue, and made a complete alteration in the materiality and in the sufficiency of the evidence for the defence. The evidence that the defendant had not the money must be directed to the time when it was alleged that he had brought it to the house, given it to the plaintiff, and borrowed it back from her; and altering the date altered the evidence. Though I can not believe that the plaintiff's counsel pinned themselves to January 16; that date may have been suggested, and it probably was mentioned, at the trial; but, as the evidence now stands, could it possibly be held that a verdict finding that

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the money was lent on that day could be upheld? I do not think that the plaintiff took it on herself to swear to any particular date, by the day of the month, or of the week. But, by the details of the alleged transaction, she seems to me to have fixed the date as the evening of the day on which the defendant went to Dunmanway, drew a sum of more than £100 from the bank, and brought back a number of notes to his father's house, out of which he handed her notes worth £100, which she swore that, within half an hour, she gave back to him as a loan. As the evidence now stands, the defendant appears to be able to identify the date on which he got the money, and he produced evidence that, on that same day, he parted in Dunmanway with so much of it that he could not have given £100 to his sister, unless he first went home, and then, after borrowing it, went a second time to Dunmanway to pay it away there. When the date was changed at the trial, he was *taken at a disadvantage*, which I regard as a "surprise," because the evidence by which he proved that he had parted with the money before the 31st January was suddenly rendered incomplete, because it failed to prove the hour, or the time of day, at which the payments in Dunmanway were made.

I cannot agree that the issue whether there was a loan "at all," could be fairly tried *in generalibus*. It must be shown at what particular time the money is alleged to have been paid and lent back, before the truth of the defence can be tested with justice; and that the real issue upon the evidence was not tried, seems to me to be shown by the way in which the plaintiff's counsel here have been driven to make the far-fetched and inconsistent suggestions, *either* that the defendant went back to Dunmanway on the same evening, after the loan, and then paid away the borrowed money; *or* that he passed off one £20 note, and four £1 notes, for £100, when he handed the money to his sister.

HOLMES, L.J.:—

The defendant went to trial on the allegation in a specially endorsed writ that his sister lent him £100 on the 31st January, 1902. He provided himself with evidence which seems to me satisfactory that she could not have lent it at that date. It

is admitted that the only source from which it could have been got was the fortune of the defendant's wife, and the defendant showed that before the 31st January he had paid away sums which would have left him much less than £100 at that date. But it appeared from the evidence of the plaintiff and her sister that the loan was at a much earlier date—four or five days after the 11th January. That being so, the preparations which the defendant had made for the purpose of meeting the case of a loan on the 31st became valueless. When the case stood in that position, the defendant said, "I could not have paid £100 to my sister then, because I did not get the money till the 21st January. He produced a document to prove this, which was properly rejected, and he was thus left without the means of meeting the newly alleged date of the loan. When leave was given to the plaintiff to amend the date, the defendant should have been given an opportunity of showing when he actually received the money, and that he had at once paid it away to creditors. For these reasons, without saying a word as to the merits, the verdict was unsatisfactory, and I think with regret that in the interests of justice there must be a new trial.

Order of the King's Bench Division affirmed.

Solicitors for the plaintiff, appellant: *Wynne & Wynne.*
Solicitor for the defendant, respondent: *Fitzmaurice.*

W. G.

Appeal. 1909. Feb. 5.

JOHN JOSEPH D'ARCY *v.* LORD CASTLEMAINE AND SIR CHARLES CAMERON (1).

(1908. No. 6822.)

Lease—Surrender—Possession.

Leasehold premises were vested in the defendants, as trustees for debenture-holders of a Company, who were the original lessees. Subsequently, in a debenture-holder's action against the Company and the defendants, a receiver was appointed over the Company's property, and, by an order in the suit, the defendants were empowered to "execute a surrender" of the leasehold premises to the lessor, the latter agreeing to accept the surrender on payment by the defendants of £100 in discharge of all claims in respect of the breach of any covenant in the lease.

The defendants executed the deed of surrender, and paid the consideration money, but failed to yield up clear possession of the demised premises:—

Held, that the lessor was entitled to maintain an action for damages for breach of contract to deliver up clear possession of the premises.

THIS was an appeal by the plaintiff against an order of the King's Bench Division, dated the 14th December, 1908, whereby the verdict and judgment entered for the plaintiff at the trial of the action was set aside, and judgment entered for the defendant.

By an indenture of lease dated the 5th December, 1899, the plaintiff in this action demised to the Atlantic Oyster Fisheries Company, Limited, part of the lands of Dawrosbeg, with the dwelling-house, fishing-lodge, and offices thereon, for the term of ninety-nine years, at the yearly rent of £25.

By an indenture, dated the 30th December, 1899, the Atlantic Oyster Fisheries Company, Limited, assigned to the defendants in this action all the property of the Company, including the premises comprised in the said lease, to hold as trustees for debenture-holders of the Company. In the year 1904 an action was instituted in the Chancery Division of the High Court of

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Justice in England by certain debenture-holders of the Company against the Company and the present defendants, seeking to raise the amount of the plaintiffs' debenture-stock, in the course of which action a receiver was appointed, and all the property of the Company realized, save the said leasehold premises. As no purchaser could be found for the latter, a lengthy correspondence took place between the solicitors for the plaintiff and the defendants in this action, discussing the terms of a surrender of the said leasehold premises from the defendants to the plaintiff, the terms of such surrender being subject to the approval of the Court of Chancery; and, ultimately, the plaintiff on the 13th November, 1907, agreed to accept £100 for arrears of rent and dilapidations, and to take a surrender of the premises. By an order, dated the 22nd day of November, 1907, made on further consideration in the said debenture-holders' action, it was (*inter alia*) directed that the receiver over the property of the Company should be discharged, and that the present defendants should "be at liberty forthwith to execute a surrender of the leasehold properties standing in their names as trustees . . . upon the terms of payment to John Joseph D'Arcy, the lessor of the said properties, of the sum of £100, in full discharge and satisfaction of all claims for arrears of rent, dilapidations, or otherwise, and of the further sum of £6 6*s.* for his agreed costs of such surrender."

By indenture, dated the 10th day of February, 1908, and made in pursuance of the said order of the 22nd November, 1907, and in consideration of the sum of £100, expressed to be paid by the defendants to the plaintiff, and received by the plaintiff in discharge of all claims for rent, damages, and claims in respect of the breach of any covenant in the said lease, the defendants surrendered to the plaintiff all the lands and hereditaments comprised in the said lease.

After the execution of the said surrender it transpired that one Connolly, a caretaker, formerly in the employment of the receiver, but who had been discharged by the receiver in April, 1907, was in possession of portion of the premises comprised in the lease, and refused to give up possession until paid certain arrears of wages claimed by him as due from the Company. The

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plaintiff then required the defendants to yield up to him clear possession of the premises, and on their refusing to eject Connolly, instituted this action on the 29th day of May, 1908, claiming—(1) £25 for one year's rent payable in respect of the premises; (2) £50 for mesne rates; and (3) £50 damages for breach of agreement by the defendants to deliver up clear possession of the premises to the plaintiff. The defendants by their defence denied that they agreed to deliver to the plaintiff clear possession of the premises, and alleged that on the execution of the surrender, and acceptance by the plaintiff of the sum of £106 6*s.*, the consideration for the said surrender, all the interest of the defendants under the lease was determined, and became vested in the plaintiff, and that all rent under the lease was thereby satisfied.

The action was tried before the Right Hon. Mr. Justice Kenny, at the Galway Summer Assizes, 1908, whereupon the following questions were left to the jury, the answers to which are appended :—

1. Was it agreed between the plaintiff and the defendants that in surrendering the premises, clear and vacant possession of the lodge was to be given by the defendants? *Answer*—Yes.

2. Was clear and vacant possession given? *Answer*—No.

3. If not, what damages has the plaintiff thereby suffered? *Answer*—£30.

The learned Judge entered judgment on these findings for the plaintiff for £30 and costs.

By an order of the King's Bench Division, dated 14th December, 1908, this verdict and judgment were set aside, and judgment entered for the defendants on the grounds that there was no complete contract between the parties for a surrender other than that contained in the deed of surrender of 10th February, 1908, and that on the execution of the deed of surrender and payment of the consideration for the said deed, the defendant's liability was at an end. Hence this appeal.

Fetherstonhaugh, *K.C.*, and *Hynes*, for the appellant :—

The landlord is entitled to clear possession of the premises, otherwise the deed of surrender is a nullity: *Henderson* v.

Squire (1). To "surrender" does not mean merely to execute a deed of surrender; it is the yielding or delivering up of lands or tenements, and the estate a man hath therein, unto another that hath a higher and a greater estate in the same lands or tenements: Sheppard's Touchstone.

Jellett, *K.C.*, and *Denning*, for the respondents:—

The correspondence between the parties prior to the mention of the deed of surrender did not create a binding contract to surrender, the proposal being subject to the approval of the Court of Chancery. That being so, the only contract between the parties is contained in the deed of surrender itself, which was executed in pursuance of the order of the Court of Chancery, and on the execution of that deed, and the payment of the sum of £100, which was accepted by the lessor in discharge of all claims in respect of any breach of covenant in the lease, including the covenant to yield up possession on the expiration of the term, the defendants' liability came to an end.

THE LORD CHANCELLOR:—

We do not require to hear a reply, as we are all of opinion that the verdict and judgment entered for the plaintiff at the trial must be restored.

The lease of the 5th December, 1899, contained the usual covenant on the part of the lessees that on the expiration or sooner determination of the demise they would yield up the demised premises to the lessor, and, apart from the order of the Court of Chancery, the form of which has been relied upon by the respondents, it is clear that if, during the term, the lessor and lessees had agreed for a surrender to the lessor of the demised premises, the lessees would have been bound, in pursuance of such agreement, to yield up the actual physical possession of the premises to the lessor, and that they would not have carried out their agreement merely by the execution of a deed of surrender. Here the lessor had signified his readiness to accept a surrender on payment by the lessees of a sum of money, and it is true that any

(1) L. R. 4 Q. B. 170.

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agreement to that effect was necessarily subject to the approval of the Court of Chancery in England, which had appointed a receiver over the property of the Company; but how can the order of the Court of Chancery discharging the receiver, and empowering Lord Castlemaine and Sir Charles Cameron to surrender the lease on the terms mentioned, affect the lessor's right to clear possession of the premises on the execution of the surrender? The deed of surrender was executed on the 10th February, 1908; it recites the order of the Court of Chancery, and the terms of the surrender, and Lord Castlemaine and Sir Charles Cameron thereby purported to "surrender and assign" the demised premises to the lessor. To surrender and assign necessarily implies and involves the giving up of clear possession of the demised premises to the lessor in this, as in any ordinary case between landlord and tenant; the act of surrender could not be completed merely by the execution of the deed, or until physical possession was yielded to the lessor. That has not been done, because Connolly is still there, and accordingly an action for damages lies against the defendants. The jury has assessed the damages at £30, and we cannot interfere with their measure.

The appeal must be allowed, and the verdict and judgment entered at the trial restored.

Fitz Gibbon and Holmes, L.JJ., concurred.

Solicitors for the appellant: *White & White.*
Solicitors for the respondents: *Thomas Gerrard & Co.*

R. ST. J. C.

THE DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION FOR IRELAND AND HUGH KENNEDY, COMPLAINANTS; THE CITY OF CORK STEAM PACKET CO., DEFENDANTS (1).

K. B. Div. 1909. Feb. 4, 5. June 4.

Fertilizers and Feeding Stuffs Act, 1906 (6 *Edw.* 7, *c.* 27)—"*Official sampler*"—*Person entrusted with charge or custody of article*—*Carrier.*

K. was a person appointed by the Department of Agriculture and Technical Instruction for Ireland as their sampler, to take samples of fertilizers and feeding stuffs for the purposes of the Fertilizers and Feeding Stuffs Act, 1906.

The defendants had in their possession in Cork a quantity of manure, consigned from Liverpool to merchants in Ireland. Their possession was solely as carriers.

K. applied to the defendants for permission to take samples of the manure, but the defendants refused to allow him to do so:—

Held, that K. was an "official sampler" within the meaning of section 8, sub-section (a), of the above-mentioned Act; that the defendants were persons entrusted for the time being with the charge or custody of an article within the meaning of the sub-section; and that the defendants were guilty of an offence under the section.

CASE STATED by the Recorder of Cork at the Cork Borough Trinity Quarter Sessions, 1908.

The case set out as follows:—

"1. This was an appeal by the defendants from a conviction by the magistrates at Cork Police Court on the 2nd May, 1908, upon the hearing of a complaint brought by the complainants against the defendants, charging that on the 7th April, 1908, at Penrose Quay, in the county borough of Cork, defendants, being the persons entrusted for the time being with the charge and custody of certain articles, to wit, manures intended to be sold for use as a fertilizer of the soil, unlawfully did refuse to allow the complainant, Hugh Kennedy, the duly appointed official sampler of the Department of Agriculture and Technical Instruction for

(1) Before LORD O'BRIEN, L.C.J., and MADDEN, WRIGHT, and DODD, JJ.

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Ireland, to take a sample of the said manure for the purpose of analysis, against the form of the statute in that case made and provided. On the making of such conviction the magistrates ordered the defendants to pay, as and for a fine to the Crown, the sum of 10*s.*, and as and for costs to the said complainants the sum of 2*s.*, and in default that same be levied by distress and sale of defendants' goods. The defendants duly appealed from said conviction, and the appeal came on for hearing before me at the above-mentioned sessions. . . . The summons was brought under section 8 (a) of the Fertilizers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27).

"2. On the hearing of the said appeal the complainant, Hugh Kennedy, produced his appointment as sampler of the complainants, the Department of Agriculture and Technical Instruction for Ireland. A copy of the appointment is annexed to this case."

[The appointment was under the seal of the Department, and was in the following terms :—The Department of Agriculture and Technical Instruction for Ireland hereby appoint Mr. Hugh Kennedy, of The Octagon, Westport, as their sampler under the provisions of the Fertilizers and Feeding Stuffs Act, 1906, and hereby authorize him to take samples of fertilizers and feeding stuffs for the purposes of the Act.]

"3. The defendant Company are the owners of steamers plying between Cork and ports in England. On the 6th April a quantity of manure, consigned in part to merchants in the city of Cork and in part to various persons in inland towns in Ireland, was brought by defendants' steamer from Liverpool to Cork, and landed on the public quay alongside said steamer to await delivery. This manure was in the possession of the Company solely as carriers.

"4. The complainant, Hugh Kennedy, on the 6th April applied to the defendants' secretary for permission to take samples of the manure for analysis, pursuant to the provisions of the Fertilizers and Feeding Stuffs Act, informing the secretary of his official position, and claiming to take a sample. So taking a sample would involve opening certain bags, and spreading and mixing portion of the contents, and taking the sample from such mixture. The defendants' secretary refused to allow complainant

to take the sample, on the ground that, the manure being in the possession of the Company solely as carriers, they had no power to open the bags, or to authorize anyone else to do so."

The learned Recorder was of opinion and held :—(1) That the complainant, Hugh Kennedy, was not an official sampler under section 8, sub-section (a), of the Act, entitled to be allowed to take a sample of the article; (2) that the defendant Company, being in possession of the goods solely as carriers and for the purpose of transit only, were not persons entrusted for the time being with the charge or custody of an article sold, or intended to be sold, within the meaning of section 8, sub-section (a); (3) that the defendant Company, by their secretary, refused to allow the complainant, Hugh Kennedy, to take a sample of the manure for the purpose of analysis. He allowed the appeal, reversing the order of the Justices, and dismissed the complaint with 40*s.* costs.

The questions stated for the decision of the Court were :—

1. Was the complainant, Hugh Kennedy, an official sampler within the meaning of section 8, sub-section (a), of the Act, entitled to be allowed to take a sample under said section?

2. Were the defendant Company persons entrusted for the time being with the charge or custody of an article intended to be sold within the meaning of that section?

The Solicitor-General (*Redmond Barry, K.C.*) (with him *Molony, K.C.*, and *Dudley White*), for the complainants :—

The complainant, Kennedy, is an official sampler within the meaning of the Fertilizers and Feeding Stuffs Act, 1906. By section 12 of that Act the Department of Agriculture and Technical Instruction for Ireland is empowered to take samples for the purpose of instituting prosecutions. It can only do so by its officers. Power to appoint officers is given by sect. 6 of the Agriculture and Technical Instruction (Ireland) Act, 1899. The officer appointed by the Department to take samples exactly answers the description of an official sampler. The term cannot be confined to the official sampler referred to in sect. 2, sub-sect. 2, of the Act of 1906. Such sampler is not under the control of the Department. Moreover, in the case of a County Borough, there is no obligation on the council of the borough to appoint an official sampler.

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A carrier is a person entrusted for the time being with the charge or custody of the goods within the meaning of sect. 8 (a) of the Act of 1906. He is clearly entrusted with the custody of the goods carried, and he is answerable as an insurer for their safety. The fact that a carrier has no authority to break bulk is immaterial. The official sampler has power to take a sample with or without the consent of the owner of the goods. The right of the carrier to refuse to allow a sample to be taken cannot be greater than the right of the owner. The official sampler has a right to take a sample of any article which has been sold, or is exposed or kept for sale: sect. 3 (2); sect. 12. In the present case the goods had been sold. [He also referred to the Sale of Food and Drugs Act, 1875, sects. 13, 17; Sale of Food and Drugs Amendment Act, 1879, sects. 3, 4; Sale of Food and Drugs Act, 1899, sect. 2.]

A. M. Sullivan, K.C., and *The Hon. Cecil Atkinson*, for the defendants:—

The complainant Kennedy is not an official sampler within the meaning of the Act of 1906. The term "official sampler" is a term of art. It is used for the first time in the Act of 1906, and applies only to the official sampler appointed by a County Council or Council of a County Borough under sect. 2 (2). The intention was that these local bodies should have the control of the working of the Act.

A carrier is not a person entrusted with the charge or custody of an article within sect. 8 (a). The provisions of that section can only refer to a person who has power to allow a sample to be taken. A carrier has no such power. He cannot break bulk, or allow bulk to be broken. To constitute the offence mentioned in the section, there must be a refusal to allow the official sampler to take samples in a case in which by the Act he is empowered to take samples. The only sections conferring such power are section 3 (2) and section 12, and the power is confined to cases of articles which have been sold, or are exposed or kept for sale. The goods here were not exposed or kept for sale, nor do they come within the description of articles which have been sold, since that must mean articles which have been sold in Ireland, and cannot

be intended to apply to a case where the sale took place outside the jurisdiction of the Department. Great inconvenience would result if goods could be stopped in transit for the purpose of taking samples.

Molony, K.C., in reply.

Cur. adv. vult.

June 4.

LORD O'BRIEN, L.C.J. :—

We have considered this case very carefully. My brother Dodd has written a judgment, which my brother Madden has been good enough to state that he will read, and in which I concur.

MADDEN, J. :—

I proceed to read the judgment of my brother Dodd, prefacing it by saying that I adopt it in its entirety, and do not intend to add any observations of my own.

DODD, J. :—

There are two questions to be determined in this case, and the determination depends on the construction and application of two sections of an Act of Parliament, the Fertilizers and Feeding Stuffs Act, 1906. A great many sections of other Acts, said to be *in pari materia*, were referred to; but save for a matter almost collateral, to which I shall briefly refer, they do not, I think, give much assistance. On the other hand, the Fertilizers and Feeding Stuffs Act, 1893, does throw some light on the questions. The whole code is within these two Acts.

The first question is, What is the meaning of the words "official sampler" in the Act of 1906? Under the Act of 1893, though there was an analyst appointed officially, no one save the purchaser had any right to take samples, and the words "official sampler" must get interpretation from the Act of 1906 itself. The words occur first in section 2, sub-section 2: "Every County Council shall, and the County Council of any County Borough may, appoint an official agricultural analyst . . . and one or more official samplers for their county or borough." And section 3, sub-section 2, enacts that "an official sampler shall, at the request

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of the purchaser, and on payment by him of the required fee, and may, without any such request, take a sample for analysis."

It is to be observed that the Act as drafted applies to England, and it is only by an independent section (section 12) it is applied to Ireland. No power is given in the Act to the English Board (the Board of Agriculture and Fisheries) either to take samples or appoint a sampler, and the words "official sampler" would seem in England to be confined to a sampler appointed by a County Council, or the Council of a County Borough, there being no other person officially authorized to take samples. But, in the section applying the Act to Ireland, it is expressly enacted that for the purpose of instituting prosecutions the Department of Agriculture and Technical Instruction for Ireland may take samples of any articles to which this Act applies which have been sold, or are kept or exposed for sale. Section 17 of the Agriculture and Technical Instruction (Ireland) Act, 1899, is specially applied to this Act, and the Department is authorized to take such steps as they think proper for instituting prosecutions under sections 6, 7, and 8 of the Act of 1906. For this purpose they may take samples. They cannot do so as a Board; they must act through officials. Section 8 makes it an offence to refuse to allow an official sampler to take a sample, and the Department may prosecute under this section, and take samples for that purpose. Is the "official" appointed by the Board to take the samples an official sampler? I am of opinion he is. He is an official duly appointed—he is a sampler; and the words put together make an "official sampler." The argument addressed to us, which prevailed with the learned Recorder, rests on the assumption that the words are a title rather than a description, analogous to the Official Assignee in Bankruptcy, and that the only persons to appoint to the office are County Councils or the Councils of County Boroughs. But inasmuch as in Ireland the Department in Ireland can take samples, and appoint an officer to take samples, I can find nothing in the Act to limit the words to a person appointed by a Council. The words are used in contradistinction to the purchaser, who is also enabled to have samples taken, but is not an official sampler.

The second question is more difficult. The sample here was demanded from neither the vendor nor purchaser, but from the

carrier. The words in section 8 are, "If the owner, or the person entrusted for the time being with the charge or custody of any article sold, or intended to be sold, . . . refuses to allow an official sampler to take a sample of the article for the purpose of analysis," he shall be guilty of an offence. It is contended that on the true grammatical construction of the words, carriers are not persons entrusted for the time being with the charge or custody of the articles. It is hard to see why they are not. If the words were "to whom has been committed the charge of the goods for the time being," carriers would obviously be included, I should say. The words are simply equivalent to any person who has the charge or custody of the goods. A carrier is a person having charge; a warehouseman is a person who has the custody. But Mr. Sullivan urges that the word "entrusted" is not an apt word to describe the kind of possession a carrier has. This word, however, is the word used by Holt, C.J., in his fifth head of bailment. Treating of a common carrier, he says:—"The law charges this person 'thus entrusted' to carry goods against all events but acts of God and enemies of the King." And later on he refers to persons the necessity of whose affairs obliges them *to trust* this sort of persons: *Coggs* v. *Bernard* (1). Addison, purporting to quote from Keilwey, says:—"Whenever a man undertakes the public office or profession of a common carrier of goods, he undertakes a public trust for the benefit of the rest of his fellow-subjects, and is bound to serve the subject in all the things that are within the reach of such an office, under pain of an action against him": Addison on Contracts (10th ed.), p. 943. I cannot find the passage in Keilwey; but Lord Holt's use is sufficient. The words "for the time being" are specially applicable to carriers. It is to be borne in mind that under the former Act it was the purchaser alone who had power to take the initiative to put the law in force, though the prosecution was not in his hands. But this Act is one for the benefit of the public, and even against the purchaser can be enforced, and enforced by a public body. The words are as general as can be.

But it is urged that the inconvenience to commerce is so great, and that the duty of the carrier would be so complicated, if the

(1) Lord Raymond's Reports, 909.

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carrier were included in the class, the Legislature cannot be presumed to have conferred so great a power on the Department.

There is nothing in the context to suggest any restricted meaning. The mischief is the adulteration of fertilizers and feeding stuffs. It is a public evil to have such used, as well as an injury to the ultimate purchaser, and should be prevented. The place, of all places, where the mischief can be best checked is upon the stuff reaching Ireland. It practically gives power to the Department to institute a search for suspected stuffs, wherever the stuff may be. Was that intended? I think it was.

It is in this connexion that the provisions in the Margarine and other Acts become of some slight assistance: Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 3; 62 & 63 Vict. c. 51, s. 1. In some instances goods in transit are included among goods in respect of which samples may be demanded. In some cases the Customs have power to take samples on the goods coming into the country. These provisions were inserted to get rid of previous restrictions. The whole procedure was at first timid, tentative; but as it was found to be beneficial, the succeeding Acts gave wider and wider powers. And this Act practically says, wherever suspected goods may be, at any place, after being sold, or intended to be sold—in other words, on their way to be finally used to the detriment of the public—the person for the time being having charge or custody must allow an official duly authorized to take a sample; and I think it was assumed that the Department would so exercise the right as to make the interference with traffic as light as possible. Indeed, if the carrier would say, "I do not refuse, but I desire that you take the sample at a reasonable and convenient time," I do not think such would be a refusal within the section. The corresponding code shows that as each interference with individual rights was found to be beneficial the power was extended; and no limitations on the right are to be found in this Act.

This disposes of a contention of Mr. Sullivan, that these goods had not been *sold*. He says the sale must be a sale inside the jurisdiction of the Department. That is not in the Act. The Act applies to goods that have been sold, or are intended to be sold, or kept for sale: in other words, to all stuffs that are likely to be

used so as to result in mischief. The search may be either on their way to the ultimate user of the goods, or after they have reached him. Goods consigned to a carrier are clearly marked out as intended to be used.

I am of opinion, therefore, that the words "a person entrusted with the care of goods" are wide enough to include a carrier.

The only other question is, Was there a refusal? I think there was. The carrier did not suggest a more reasonable time or place. He relied on the obligation he was under to the consignor or consignee not to break bulk. He wished to have his duty clearly ascertained. Of course, the penalty will probably be merely nominal.

I am of opinion, accordingly, that both questions should be answered in the affirmative.

WRIGHT, J.:—

Two questions, entirely separate and distinct, are raised in the case stated by his Honour the Recorder of Cork, which I shall consider in the same order in which they are dealt with by him in the very clear and logical judgment which he delivered.

1. Is the complainant, Hugh Kennedy, an official sampler within the meaning of section 8 (a) of the 6 Edw. 7, c. 27?

By section 2, sub-section 2, of that Act the appointment of officials, such as official samplers and official agricultural analysts, is given to the local bodies, *i.e.* County Councils and County Borough Councils. By sub-section 1 of the same section a chief agricultural analyst is to be appointed, in England by the Board of Agriculture and Fisheries, and in Ireland (by the effect of section 12) by the Department of Agriculture and Technical Instruction. This division of the power of appointment of officials is taken from the Fertilizers and Feeding Stuffs Act of 1893 (56 & 57 Vict. c. 56 (repealed *in toto* by the Act of 1906), sect. 4), the language of which is very similar to that of section 2 of the later Act—indeed, almost identical with it, but for the appearance for the first time in the later Act of official samplers.

Under section 12 of the Act of 1906 the Department of Agriculture and Technical Instruction, which I shall refer to as "the Department," may institute prosecutions for offences within

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sections 6, 7, and 8 of the Act, and for that purpose may take samples of any articles to which the Act applies, "which have been sold, or are kept or exposed for sale." The Department acts, of course, by its servants in taking samples; and, by section 6 (1) of the Act creating the Department (62 & 63 Vict. c. 50), it may, with the consent of the Lord Lieutenant and the Treasury, appoint "a secretary, &c., and such inspectors, instructors, *officers*, and *servants* as it may require."

By section 2 of the 62 & 63 Vict. c. 51 (Sale of Food and Drugs Act, 1899), an Act passed on the same day as the Agriculture and Technical Instruction (Ireland) Act, 1899, the Department is expressly empowered to direct their officer to take samples of food for analysis; but this Act and the other Sale of Food and Drugs Acts are a code in themselves, and are distinct from the Act of 1906, now under consideration. No express provision as to taking samples by its officers is to be found in that Act (6 Edw. 7, c. 27); but the power to take samples given to the Department by section 12 of the Act already referred to, must be exercised by them through a servant appointed by them for the purpose of taking samples. In so acting he is performing the functions, and must be deemed to be invested with the power, of a sampler—by the Act designated an official sampler—and for the same purposes, including that of instituting a prosecution, if necessary. It follows, in my opinion, that to refuse to allow him to take a sample is an offence within section 8 of the Act. The first objection to the summons, in my judgment, fails.

2. The second question is this—Are the defendants, the City of Cork Steam Packet Company, a person or persons entrusted for the time being with the charge or custody of an article sold within section 8 of the Act. The language of the section is apparently taken from section 4 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), but with a difference which may or may not be deemed material. The language of section 4 of the Act of 1879 is as follows:—"The seller or consignor, or any person or persons entrusted *by him* for the time being with the charge," &c. In section 8 of the Act of 1906 the words "by him" are omitted, and apparently no limitation of the class of persons entrusted with the care or custody of goods is imposed. Is

a carrier such a person? In construing the Act I think it preferable to avoid minute and microscopic criticism of the words of the section, and to consider the mischief aimed at and the remedy intended to be given.

The learned Recorder has put his view very clearly and very tersely in a couple of sentences. He says:—"The strictly limited nature of the possession held by carriers, and the strictness of the obligations under which they are bound to receive and carry and hold goods, are well known. They have no property in, or dominion or control over, the goods, which would lawfully authorize them either to break bulk or open parcels themselves, or to allow other persons to do so. I cannot read this section as meaning or intending to confer upon mere carriers such power by implication." But a carrier certainly has the care of the goods: they are given to him to be taken care of by him during the whole course of the journey over which he undertakes to carry them. Giving its ordinary meaning to the word "entrusted," as used in the section, the goods are entrusted to the carrier, and he has the care and custody of them during the journey, and until delivery. The offence may be committed either (1) when and where an article is intended to be sold, or (2) when it has been sold; and, as the object of the Act is to prevent frauds on the public by palming off on them cheap, adulterated, or inferior goods, I see nothing in the policy of the Act, any more than I do in the language used in the section, to exclude from its application carriers of an article anywhere in Ireland, whether the sale was in Ireland or elsewhere outside Ireland.

3. As to the remaining question, on the facts proved I agree with the learned Recorder that there was a refusal to allow a sample to be taken.

For these reasons I concur with my Lord and my brethren that the conviction ought to have been affirmed.

Solicitor for the complainants: *Malachy Kelly.*

Solicitor for the defendants: *A. H. Julian.*

J. G. T.

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THE KING (AT THE PROSECUTION OF JAMES BARRY) *v.* DANIEL MAHONY, ONE OF THE DIVISIONAL JUSTICES OF THE POLICE DISTRICT OF DUBLIN METROPOLIS (1).

Food and Drugs Acts, 1875, 1899 (38 & 39 *Vict. c.* 63; 62 & 63 *Vict. c.* 51) *—Prosecution by member of public—Analyst's certificate—Certificate obtained in another proceeding.*

P., a retail dealer in milk, had been successfully prosecuted for selling adulterated milk, which she had innocently purchased from B., a wholesale dealer in milk. She then prosecuted B., giving in evidence the certificate of analysis which had been used in the prosecution against herself, but not any certificate of analysis made on her own behalf. No copy of any certificate of analysis was served on B. with the summons:—

Held, on motion to make absolute a conditional order for *certiorari*, that the conviction could not be sustained.

Guardians of Enniskillen Union v. *Hilliard* (14 L. R. Ir. 214) and *Connor* v. *Butler* ([1902] 2 I. R. 569) followed.

ON the 15th December, 1908, a summons was issued against the prosecutor, James Barry, on the complaint of Kate Purcell, that he did on the 2nd November, 1908, at 106 Lower Dorset Street, sell to her prejudice as purchaser thereof an article of food, to wit new milk, which was not of the nature, substance, and quality of the article demanded by her, but was milk adulterated by the addition of 41 per cent. of its weight of water, making thereby a mixture of 100 parts of milk and 41 parts of water. The summons came on for hearing at the Dublin Police Courts before Mr. Mahony on the 22nd December, 1908. An objection was made on behalf of James Barry, that no copy of the analyst's certificate obtained on behalf of the prosecutor had been served with the summons, or at all, upon him in compliance with the provisions of section 19, sub-section 2, of the Sale of Food and Drugs Act, 1899. The hearing of the summons was adjourned to the 5th January, 1909, when an order was made by

(1) Before GIBSON, BOYD, and KENNY, JJ.

the magistrate that Barry should pay a penalty for the offence, the sum of £15, and that he should pay to Kate Purcell the sum of £5 5*s.* 1*d.* for costs.

The evidence produced in support of the complaint consisted of the evidence of Kate Purcell, the complainant, who swore that Barry was a wholesale milk merchant at Santry, and that he supplied her since June, 1908, with six gallons of new milk per morning, and four gallons per afternoon.

On the 2nd November, 1908, about 3 p.m., Barry's man brought the afternoon supply, three gallons of which Kate Purcell put into a clean pan from which a sample was shortly afterwards taken by Mr. Tutty, a Corporation inspector under the Food and Drugs Act; that from the time the milk was delivered by Barry's man until the sample was taken by the inspector, Kate Purcell had not interfered with the milk, and that when she learned the result of the Corporation analysis she informed Barry's man. The inspector, having taken the sample, divided it into three parts, one of which he left with Sir Charles Cameron, the public analyst, who found that it contained 100 parts of milk and 41 parts of water. Barry was examined on his own behalf, and stated that on the occasion in question he made up the milk himself, and never tampered with it in any way. There was no evidence produced or tendered on behalf of the complainant to prove that any analysis of any milk purchased by the complainant from Barry had been made on her behalf by any analyst, nor was any evidence given or tendered of any certificate of such analysis having been produced by or on behalf of Kate Purcell. Prior to the conviction in question, Kate Purcell had been prosecuted at the instance of the Dublin Corporation in respect of the identical adulterated milk, and was subjected to a penalty of £10. The evidence tendered against her on that occasion was that of Inspector Tutty, and a certificate of the analyst was also produced. It was for the purpose of this prosecution by the Dublin Corporation that the sample of milk was procured by Inspector Tutty. The milk was purchased by Kate Purcell from Barry in the ordinary course of her business as a dairy proprietor, and was not purchased with a view to submitting same to analysis or for test purposes.

A conditional order for a writ of *certiorari* to quash the

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conviction was granted, in which the grounds relied on were as follows :—

(1) That no copy of the analyst's certificate obtained on behalf of the complainant was served with the summons.

(2) That under section 20 of the Food and Drugs Act, 1875, proceedings for the recovery of the penalty therein imposed should be taken by the person causing the analysis to be made.

(3) That the evidence of the analyst (Sir C. Cameron) as to the contents of a sample of new milk, submitted to him by Inspector Tutty for the purposes of a prosecution against Kate Purcell, the complainant herein, could not be evidence against the defendant.

(4) That the complainant's remedy was not by a summons like the present summons, but was the remedy prescribed by section 28 of the Food and Drugs Act, 1875.

(5) That in the case of wholesale deliveries of an article under a contract, the provisions of the Act of 1875 are not applicable. The amending Act of 1879 was expressly passed to meet such a case, and under that Act proceedings can only be taken by a public officer authorized under section 3 of the Act.

Kate Purcell showed cause.

Joseph O'Connor, for Barry, moved to make absolute the conditional order :—

The conviction on the 5th January cannot be sustained on the following grounds :—

1. No copy of an analyst's certificate obtained on behalf of the complainant was served with the summons, as provided by sect. 19, sub-sect. 2, of the Sale of Food and Drugs Act, 1899.

2. Under section 20 of the Food and Drugs Act, 1875, proceedings for the recovery of a penalty under the Act must be taken by the person causing the analysis to be made : see observations of Baron Dowse, and Andrews, J., in *The Guardians of the Enniskillen Union* v. *Hilliard* (1), and of Kenny, J., in *Connor* v. *Butler* (2).

3. The evidence of the analyst (Sir Charles Cameron) as to the contents of a sample of new milk submitted to him by Food

(1) 14 L. R. I. 214. (2) [1902] 2 I. R. 569, at p. 581.

Inspector Tutty for the purpose of the prosecution instituted by the Dublin Corporation against the complainant was not admissible against the defendant: *Tyler* v. *Kingham & Son, Limited* (1).

4. The complainant's remedy was by a civil and not by a criminal proceeding.

5. In the case of wholesale deliveries of an article under a contract, the provisions of the Act of 1875 are not applicable. The amending Act of 1879 was expressly passed to meet such a case; and under that Act, proceedings can only be taken by a public officer authorized under section 3 of the Act.

[He also cited *Harris* v. *Williams* (2), *The Queen* v. *Smith* (3), Hardcastle on the Construction of Statutes, p. 554.]

Clancy, K.C., and *Louis Kelly*, in support of the conviction:—

1. Section 19 (2) of the Act of 1889 refers to purchases made for test purposes. This is clearly shown, and the language of the sub-section as to the analyst's certificate does not make service of a copy mandatory if it was not so previously—"A copy of *any* analyst's certificate" is sufficient.

2. Section 20 refers to purchases also for test purposes. The procuring of analysis is not a condition precedent to a prosecution: *Buckler* v. *Wilson* (4). Lord Russell of Killowen, C.J., delivering the judgment of the Court, consisting of Pollock, B., and Wright, J., and himself says—"There is nothing in the Act to prevent proof of the offence by other satisfactory evidence—nor is it necessary that the purchaser should obtain a certificate of the 'public analyst,' except when he (the purchaser) purchases 'with an intention' to submit to analysis": see also observations of Ridley, J., in *Tyler* v. *Kingham & Son, Limited*, at page 417 (1).

3. Obviously the certificate would not be evidence as infringing the *res inter alios actae* rule: see *Tyler* v. *Kingham & Son, Limited* (1). But the oral evidence of the analyst was unobjectionable.

4. Section 28 does not touch the case. It is conversant with civil proceedings.

(1) [1900] 2 Q. B. 413.
(2) 6 T. L. R. 47.
(3) [1896] 1 Q. B. 596.
(4) *Ibid.* 83, at p. 90.

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5. *Harris* v. *Williams* (1) follows *Parsons* v. *Birmingham Dairy Company* (2), which is over-ruled by *The Guardians of Enniskillen Union* v. *Hilliard* (3) and *Buckler* v. *Wilson* (4).

[They also cited Encyclopædia of Local Government Law, vol. i., pages 320 and 330.]

The Queen v. *Smith* (5) does not apply: it was a purchase for test purposes, and follows *Peart* v. *Burstow* (6) and *Smart* v. *Watts* (7), which were similar purchases.

The observations of Kenny, J., in *Connor* v. *Butler* (8) were very guarded in respect to the position of an ordinary purchaser. That case was one of a purchaser for test purposes.

O'Connor, in reply, cited *Batt* v. *Mattinson* (9).

Feb. 22.

GIBSON, J. :—

Mrs. Purcell was convicted under section 6 of the Act of 1875, for selling watered milk in a prosecution brought by Tutty, an inspector, based on a certificate of the public analyst, Sir Charles Cameron, pursuant to section 14 of the Act. She thereupon prosecuted the defendant from whom she had bought the milk, and obtained on oral evidence a conviction against him. She had procured no analysis before such prosecution, and no certificate of any analysis was served with the summons. Counsel for Barry contends that the conviction must be quashed, because an analysis procured by the complainant is a condition precedent to the right to prosecute under the Act of 1875, and because the Act of 1899 (62 & 63 Vict. c. 51), s. 19, sub-s. 2, requires such certificate to be served with the summons. The substantial question is the effect of the statute of 1875, on which there are two important decisions. In *The Enniskillen Guardians* v. *Hilliard* (3), it was held that sect. 14 did not apply to an ordinary buyer not purchasing for the pur-

(1) 6 T. L. R. 47.
(2) 9 Q. B. D. 172.
(3) 14 L. R. Ir. 214.
(4) [1896] 1 Q. B. 83.
(5) *Ibid.* 596.
(6) 44 J. P. 699.
(7) [1895] 1 Q. B. 219.
(8) [1902] 2 I. R. 569.
(9) 82 L. T. (N. S.) 800.

pose of analysis. There was, however, a good certificate under section 12, and the Court held that the evidence of a certificate was an essential preliminary to a prosecution. Dowse, B., points out that the statute protects the seller. At p. 223 he says that section 10, with sections 11, 12, and 13, "seems to contemplate that no prosecution can be instituted unless the article has been analyzed by the proper person appointed to do so." At p. 224, referring to sects. 20 and 21, he emphasizes that the purchaser, on discovering adulteration, can have the article analyzed by the public analyst, whose certificate is made evidence under section 21, and the part retained, if any, must be produced. The opinion of Andrews, J., was to the same effect: "A purchaser of an adulterated article who has had it analyzed by an official analyst from whose certificate it appears that an offence against the Act has been committed, is enabled to take the prescribed proceedings against the seller" (p. 228). The Court accordingly held that the certificate being sufficient the conviction should stand. In *Buckler's Case* (1), a prosecution under the Margarine Act by an ordinary purchaser, the point decided was, that sect. 14 did not apply; and there being a valid certificate under sect. 12, the Court decided against the accused. Lord Russell of Killowen expressly adopted the decision and reasoning in the Irish case, but he indicated an opinion (which seems to me inconsistent with the judgments there) that no previous certificate at all was necessary; that section 12 gives a mere privilege which the purchaser was not bound to use; that section 21 is restricted to a certificate under section 14; and that a conviction could be based on oral evidence. He does deal with section 20, which he probably construed as, in its first paragraph, confined to official prosecutions based on section 14, purchasers' prosecutions being left to be dealt with under the general provisions in the second paragraph. I agree with the opinions of Dowse, B., and Andrews, J., as to the 12th, 20th, and 21st sections. The statute pivots on analysis by a prescribed officer. Sections 10, 12, 18, 19, 20, and 21, all indicate that the analyst's certificate is an indispensable requisite in a purchaser prosecution as well as in an official prose-

(1) [1896] 1 Q. B. 83.

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cution. Section 20, under the heading "Proceedings against offenders," relates to prosecutions of every class; and "the person causing the analysis to be made" includes an ordinary purchaser. If such purchaser could treat section 12 as optional, and rely on oral evidence; or, having obtained a certificate, could suppress or discard it, the seller would have no protection from a certificate by a public official. The certificate under section 12 must be in the form prescribed by section 18, and it is evidence for the purchaser under section 21, as the *Enniskillen Case* (1) decides. Section 20 shows that the certificate so made evidence is preappointed necessary proof which the purchaser cannot omit, or, having obtained it, throw over. The dictum in *Buckler's Case* (2) was unnecessary for the decision, as there was a good certificate under section 12, and the express opinions of the Irish Judges to the contrary were unfortunately overlooked. Section 28 throws no light on the questions argued, as it is confined to indictments and civil proceedings, and such remedies cannot be affected by the character of the summary procedure, whether official or private.

Up to 1896 there was no example of a prosecution unsupported by a previous certificate, and there has been, I believe, no example since *Buckler's Case* (2). We are bound by the decision in our own Court; but out of respect to the eminent lawyers who decided *Buckler's Case* (2), I have stated my own reasons for thinking the dictum there erroneous.

The certificate obtained by Tutty in the case against Mrs. Purcell is admittedly not available for her against Barry; she should have got a certificate for herself under section 12. The statute of 1899 (62 & 63 Vict. c. 51), s. 19, sub-s. 2, strongly supports my conclusion. It extends to all prosecutions, including those by an ordinary purchaser, and assumes that a certificate is a necessary part of the prosecutor's case.

My brother Boyd concurs.

We must follow the *Enniskillen Case* (1).

(1) 14 L. R. Ir. 214. (2) [1896] 1 Q. B. 83.

KENNY, J.:—

Although counsel in support of this application has enumerated five points on which he hoped to succeed, there is really only one of substance—namely, whether, having regard to the 20th section of the Food and Drugs Act, 1875, the production of an analyst's certificate is a condition precedent to the maintenance of a prosecution for adulteration under the Act, when that prosecution is by a member of the public who has purchased the goods for the purposes of ordinary use, and not with the direct object of testing them for adulteration. If such a certificate be unnecessary, it follows that the point of non-service with the summons of a copy of the certificate need not be considered.

The section provides that where the analyst has analyzed the articles and given his certificate, the person causing the analysis to be made may take proceedings for the recovery of the penalty imposed by the statute at Petty Sessions in a summary manner.

At the hearing before the magistrate, the oral evidence of an analyst was given. A certificate of analysis was also given in evidence, but it was one not procured for the present case or at the instance of the complainant, but one obtained by a public officer who, in another proceeding, had successfully prosecuted the present complainant for selling the same milk as that alleged in this case to have been adulterated. The complainant here is only a retail dealer in milk who purchased the commodity from Barry, who is a milk dealer on a large scale. The certificate obtained in and for the purposes of another case was clearly not evidence, on the ground that it was not obtained with reference to the sale by Barry to Purcell: *Tyler* v. *Kingham & Son, Limited* (1). There was therefore no such certificate obtained as was contemplated by the Act. The prosecutor gave no evidence of having caused an analysis to be made before commencing the prosecution—much less of having obtained a certificate. How then can she maintain a summary proceeding for adulteration under the 6th section? The right is given to a person who, having caused an analysis to be made, has, before putting the law in motion, obtained a certificate of analysis showing that an offence against some one of the

(1) [1900] 2 Q. B. 413.

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Kenny, J.

provisions of the Act had been committed. The obtaining and production of such a certificate is, in my opinion, a condition precedent to the prosecution where adulteration is the basis of the offence and an analysis is necessary. The person who attempts without such a certificate to enforce the penalty, must fail for want of his initial proof of his *status* as prosecutor. It seems to me that the judgments of Dowse, B., and Andrews, J., in *Hilliard's Case* (1) are pregnant with the assumption that no other construction could be placed on the section. I think there can be very little doubt that—as I held in *Connor* v. *Butler* (2)—the section deals with prosecutions both by members of the public and by officials of the local authority; but, whoever may be the prosecutor, I consider that if an analysis forms portion of his proofs he is not in a position to commence a prosecution until he has obtained the certificate which the section provides for.

I concur in holding that the conditional order should be made absolute.

Solicitor for the prosecutor: *James Brady.*
Solicitor for Kate Purcell: *Henry Lemass.*

J. L.

(1) 14 L. R. Ir. 214.

(2) [1902] 2 I. R. 569.

H. L.
1908.
Nov. 23, 24, 30.
1909.
March 1.

COOKE *v.* MIDLAND GREAT WESTERN RAILWAY OF IRELAND.

Railway Company—Negligence—Defective fence—Infant trespasser—Invitation to danger—Turntable.

On appeal to the House of Lords from the judgment of the Court of Appeal ([1908] 2 I. R. 242), that judgment was reversed, and the judgments of Lord O'Brien, L.C.J., and of the King's Bench Division were restored.

APPEAL by the plaintiff from the judgment of the Court of Appeal ([1908] 2 I. R. 242), where the facts of the case are reported.

The Solicitor-General (*Redmond J. Barry, K.C.*) and *Dudley White* (with them *Mark Stebbing* (of the English Bar)), for the appellant.

Ronan, K.C., Fetherstonhaugh, K.C., and *Piers Butler*, for the respondents.

THE HOUSE OF LORDS (Lords Loreburn, L. C., Macnaghten, Atkinson, and Collins) reversed the judgment appealed from, Lord Loreburn stating that, with regard to the form of the judgment, the preferable method would be to restore the verdict and the judgment of the Lord Chief Justice, which was accordingly done (1).

Solicitor for the appellant: *Herbert Z. Deane* for *W. D. Sullivan.*

Solicitors for the respondents: *Martin & Co.* for *John Kilkelly.*

(1) See [1909] A. C. 229, where a full report of the case in the House of Lords will be found.

Appeal.
1909.
June 2.

TOTTENHAM *v.* FOLEY (1).

(1909. No. 3047.)

Practice—Final judgment—Motion for final judgment after delivery of defence and after pleadings closed by default of reply—Order XIV.—Costs.

An application for final judgment may be made after joinder of issue in default of reply, and judgment may be entered for the plaintiff, on terms indemnifying the defendant against costs incurred by him owing to the plaintiff's delay, when the defendant is not otherwise prejudiced by such delay.

Annaly v. *Comyn* (30 L. R. Ir. 102) not followed.

APPEAL from an order of the King's Bench Division, dated the 12th May, 1909, entering final judgment for the plaintiff for £45, the amount indorsed on the writ of summons. The action was brought to recover the said sum of £45 under a stamped agreement dated the 30th October, 1908, and made between the plaintiff and defendant, whereby the plaintiff agreed to sell and the defendant to buy the rabbits on the lands of Mount Callan, for the season 1908–09, for the said sum, the rabbits to be trapped by the defendant. The writ, which was specially indorsed, was served on the 13th March, 1909; an appearance was duly entered by the defendant, and a defence delivered on the 30th March, 1909. No reply was delivered by the plaintiff, and on the 3rd May, 1909, after issue had been automatically joined, the plaintiff served a notice of motion for final judgment.

The defendant by his defence admitted the agreement of 30th October, 1908, but alleged that he never trapped any of the rabbits on the said lands, that the plaintiff himself had the benefit of the trapping for the season, and that the plaintiff's remedy, if any, lay in an action for unliquidated damages for breach of the said agreement.

The only explanation of the plaintiff's delay in serving his

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES FITZGIBBON and HOLMES.

notice of motion for judgment was contained in an affidavit sworn by his solicitor, stating that the notice of motion and affidavit in support of same were duly prepared, but were kept back for the approval of counsel, who was absent on vacation.

The King's Bench Division entered judgment for the plaintiff as above stated, but directed that the plaintiff should pay to the defendant the costs of the defence delivered by him. Hence this appeal.

L. O'B. Kelly, for the appellant, contended that there was no jurisdiction to grant final judgment after issue had been automatically joined.

[He cited *Gleeson* v. *Croker* (1); *Burton* v. *Eastwood* (2); *Annaly* v. *Comyn* (3); *Domville* v. *Ginnell* (4); *Cowan* v. *Clancy* (5).]

Phelps, for the respondent, was not called upon.

THE LORD CHANCELLOR:—

There are no grounds for interfering with the decision of the King's Bench Division. There is no defence to the action on the merits. [His Lordship read the agreement, and continued.] Under that agreement there is a liquidated sum of £45 due by the defendant to the plaintiff, and the suggestion that the action should have been one for unliquidated damages for breach of contract cannot be supported. Mr. Kelly, however, has contended that the motion for judgment was late, inasmuch as a defence had been filed, and issue had been automatically joined, prior to the institution of the motion; and, no doubt, *Annaly* v. *Comyn* (3) affords some support for that contention. We, however, are all of opinion that in such a case as the present, where there is no defence on the merits, and where the defendant has been in no way prejudiced by the plaintiff's delay, save in respect of the costs incurred by him in filing his defence, an order for judgment should be made, on terms indemnifying the defendant

(1) 4 New Ir. Jur. 86.
(2) 27 Ir. L. T. R. 19.
(3) 30 L. R. Ir. 102.
(4) 1 New Ir. Jur. 124.
(5) *Ibid.* 229.

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The Lord Chancellor.

against the costs which have been rendered useless by the plaintiff's delay, even although that delay has not been satisfactorily explained.

This was the view adopted by Mr. Justice O'Brien, in *Annaly* v. *Comyn* (1), where he said, "I certainly think the more rational rule would be to hold that the order could be made at any time, and that it would be merely a question of terms if a motion were made subsequent to the defence."

The King's Bench Division have acted on that rule; they have given the costs of the defence to the defendant, and this appeal must be dismissed with costs.

LORDS JUSTICES FITZ GIBBON and HOLMES concurred.

Solicitors for the plaintiff: *Kerin & Hickman.*
Solicitor for the defendant: *James A. Doyle.*

R. ST. J. C.

(1) 30 L. R. Ir. 102, at p. 107.

THE TRUSTEES OF THE CONGESTED DISTRICTS BOARD FOR IRELAND *v.* CURRY (1).

K. B. Div. 1908.
Nov. 25, 27.
Dec. 15.

County Court—Undefended ejectment for non-payment of rent—Affidavit of amount of rent due—Proof of tenancy—Proof of character of tenancy—Landlord and Tenant (Ireland) Act, 1860 (23 & 24 *Vict. c.* 154), *s.* 52—*Civil-bill Courts Procedure Amendment Act (Ireland)*, 1864 (27 & 28 *Vict. c.* 99), *s.* 46—*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *s.* 7—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 12.

The plaintiff in an undefended civil-bill ejectment for non-payment of rent is not entitled to a decree for possession merely on proof of service of the civil bill and lodgment of an affidavit showing that upwards of a year's rent is due. Proof must also be given of the contract of tenancy.

Quære: Whether, where, from the form of the civil bill, it appears that execution must be as provided by section 7 of the Land Law (Ireland) Act, 1887, evidence is necessary to prove that the holding is agricultural or pastoral, or partly agricultural and partly pastoral.

Semble: In a case within section 12 of the Land Law (Ireland) Act, 1896, where more than one person is in possession, proof is necessary as to the character of the possession of each such person.

CASE STATED by Kenny, J., on the hearing of a civil-bill appeal at the Summer Assizes, 1908, for the County Mayo.

The plaintiffs were the appellants from a dismiss without prejudice given by the County Court Judge. The action was one of ejectment for non-payment of rent, the civil bill being in the Form 3A, prescribed by Order XXIIIA of the County Court Rules of the 13th March, 1897. The defendant did not take defence or appear; and the plaintiffs claimed a decree for possession, under the default procedure in the County Courts, on the production of an affidavit showing the amount of rent due to the plaintiffs.

This affidavit was made by an official of the plaintiffs, who deposed:—"1. I am the clerk in charge of the Collection Branch of the Congested Districts Board for Ireland, the plaintiffs in the above civil-bill ejectment for non-payment of rent for recovery

(1) Before PALLES, C.B., and ANDREWS, JOHNSON, and BOYD, JJ.

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of possession of all that and those that part of the lands of Derryfinlough, situate in the parish of Killedan, barony of Gallen, in the division of Swinford, and county of Mayo, held by the defendant, Bridget Curry, as tenant to the plaintiffs, for a judicial term, at the yearly rent of £1 2*s.*, payable half-yearly, on every 1st day of May and 1st day of November in each year. 2. And I further make oath and say that there is due to the said plaintiffs out of the said premises the sum of £3 6*s.*, for one year's rent and arrears, due and ending the 1st November, 1907, which sum still remains due over and above all just and fair allowances whatever. 3. That every person in possession of said premises as tenant or under-tenant thereof has been duly served with a copy of the civil-bill ejectment herein, as I am informed and believe."

It was contended for the plaintiffs that this affidavit dispensed with the necessity of any other proof, save that of service of the civil bill. The County Court Judge received the affidavit for the purpose of proving or ascertaining the amount of the rent due; but held that the other averments in the civil bill as to the nature of the tenancy, right of the person seeking to maintain the ejectment, &c., must be proved in the ordinary way, by oral or documentary evidence as the case might be. He accordingly dismissed the civil bill without prejudice.

The question reserved by the special case was, whether the plaintiffs were entitled to a decree for possession on production and lodgment of the aforesaid affidavit, and without any further evidence.

O'Brien, K.C. (with him *Coll*), for the plaintiffs:—

The plaintiffs were entitled to a decree for possession on the affidavit produced. By section 54 of the Landlord and Tenant (Ireland) Act, 1860, on proof of a sum equal to a year's rent being due, the landlord is entitled to a decree for possession; and, by section 46 of 27 & 28 Vict. c. 99 (re-enacting, as regards undefended cases, the provisions of section 88 of 14 & 15 Vict. c. 57, which had been repealed by the Act of 1860), it is provided that in civil-bill ejectments for non-payment of rent, where the defendant does not appear, the affidavit of the landlord, or his agent or receiver, for ascertaining the amount of the rent

due, shall be admissible. No doubt, the prescribed form of decree contains a statement that it appears to the Court that the premises were held by the defendant as tenant to the plaintiff; but the forms cannot alter the jurisdiction. In any case, the statement that a year's rent is due to the plaintiff necessarily involves an averment as to the tenure. [He also referred to 56 Geo. 3, c. 88, ss. 3, 7; 58 Geo. 3, c. 39, s. 3, Sch., Forms D and G; 14 & 15 Vict. c. 57, ss. 73, 74, 83, 88, 104; Land Law (Ireland) Act, 1887, s. 7; *Shuter* v. *M'Curdy* (1).] Section 12 of the Land Law (Ireland) Act, 1896, has no application to the present case, since it does not appear that there is any under-tenant.

There was no appearance for the defendant.

Cur. adv. vult.

PALLES, C. B.:— Dec. 15.

The question reserved for us by Mr. Justice Kenny is, whether the plaintiffs were entitled to a decree for possession on production and lodgment of the affidavit mentioned in the "Case," and without any further evidence. I am of opinion that they were not.

The civil-bill process was an ejectment for non-payment of rent. It is headed "Land Law Acts," and is in the Form 3A, prescribed by Order XXIIIA of the Rules of 13th March, 1897. Those Rules are confined to civil-bill ejectments for non-payment of rent, for the recovery of "a holding, or of lands including a holding, agricultural or pastoral, or partly agricultural and partly pastoral in its character"; so that I must assume that the holding is of that character.

The affidavit referred to is one purporting to ascertain the amount of the rent due, under the 27 & 28 Vict. c. 99, s. 46; and though a question arises, whether it is sufficiently shown that the deponent in it is a person authorized to make an affidavit within that section, for the purposes of this judgment, I assume, but without deciding, that he is. The defendant did not appear at the hearing of the civil bill.

Under these circumstances the plaintiffs contend that, under the joint operation of the above section and of the Landlord and

(1) I. R. 8 C. L. 577, at p. 579.

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Palles, C.B.

Tenant Act, 1860, s. 54, they were entitled to a decree without proving a tenancy. I am of opinion that this contention is not well founded.

The jurisdiction to bring such a civil-bill proceeding is conferred by section 52 of the Act of 1860, and is limited to cases in which a year's rent shall be in arrear in respect of lands held under any fee-farm grant, lease, or other contract of tenancy, or from year to year, whether by writing or otherwise. Unless, therefore, this section is qualified by some other provision, proof of the grant, lease, or other contract of tenancy would be essential. The plaintiffs, however, contend that it is so qualified by section 54 of the same Act. The portion of the section now unrepealed is in these words:—"It shall be lawful for the Chairman, on proof of the service of such civil bill in the manner hereinafter directed, and that a sum equal to one full year's rent, not exceeding the rate of one hundred pounds by the year after all just and fair allowances, was due when such proceeding by civil bill was commenced, and still remains due to the landlord, to decree the said landlord to be put into possession of the said premises, and to ascertain the amount of the rent then due."

The plaintiffs contend that the service having been proved, and that upwards of a full year's rent, not exceeding the specified rate, having been proved to be due by the affidavit at the time the proceeding was commenced and at the time of the hearing, the provisions of this section have been satisfied.

Now, this section applies as well to defended as undefended cases, and if the plaintiff's contention be correct, the Chairman would have jurisdiction to grant a decree for possession in a defended case, if a witness, say, an agent or receiver of the plaintiff, proved that an amount of rent, not being less than that for a year, was due, without proving that the plaintiff was the person entitled to receive the rent, and without proving even the existence of a tenancy. Mr. O'Brien insists that we are coerced to arrive at this conclusion from the words of the section. I cannot agree. I construe that section with the antecedent one, section 52. They appear to me to be quite consistent with each other. The previous part of the section, now repealed (a repeal which I need not say

cannot affect the construction of the portion of the section which remains unrepealed), directs that a civil-bill ejectment for non-payment of rent may be according to the Form No. 2 in Schedule A to the Act. That Form alleges that the defendant (or one of the defendants) holds certain lands "as tenant thereof to the plaintiff, under a lease (or contract of tenancy) for a term unexpired (or as tenant from year to year, *as the case may be*), at a specified yearly rent; and that the sum of £ of the said rent, being one full year's rent, became and still is due to the said plaintiff in respect of the premises."

I am of opinion that the "*one full year's rent*" in section 54 means "the full year's rent" mentioned in the civil-bill process, *i.e.* one year of the rent at which the lands are held as tenant to the plaintiff under the lease, contract of tenancy, or tenancy from year to year mentioned in the Form; and that the proof required by section 54 necessarily involves proof of the tenancy alleged in the civil-bill. Were there no tenancy, the sum of money could not be due as rent, nor could it be due to "the landlord." In the absence, then, of proof of tenancy it cannot be affirmed that a sum is due "of the said rent," nor in the absence of proof that the plaintiff is landlord can it be said the rent is due to him. Again, the jurisdiction of the Chairman is "to decree the said *landlord*," not, it is to be observed, "the plaintiff," to be put into possession. Mr. O'Brien's argument, as I understand it, was that this proof is involved in the statement in the affidavit that the rent was due to the plaintiffs—a statement which could not be accurate unless the rent had accrued due under some contract of tenancy under which the lands were held from the plaintiffs. In a sense this is true; but I am of opinion that this inferential proof of a tenancy under the plaintiffs is not within section 46 of the Act of 1864. The statement in the section is, "the affidavit of the landlord, . . ., or lessor, or his agent or receiver, for ascertaining the amount of rent due, shall be admissible—*i.e.*, shall be admissible for ascertaining the *amount* of the rent due." The section does not say that the affidavit shall be admissible for the purpose of proving the existence of the lease or contract of tenancy, the former of which should be, and the latter of which might be, in writing, and consequently not provable by affidavit. To bring the person who

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makes the affidavit within the required category, the tenancy must have been proved, as otherwise it could not be shown that the deponent was landlord, lessor, or his agent or receiver.

Further, however, it will be found that this section is *in pari materia* with a long series of similar enactments, which can be traced back to the 11 Anne, c. 2, which was the first statute in Ireland which authorized an ejectment for non-payment of rent, as distinct from an ejectment for a forfeiture by reason of condition broken. The 2nd section of that Act enacted :—"That in case of judgment against the casual ejector" (which corresponded to the present judgment by default in the High Court), "or nonsuit for not confessing lease, entry, and ouster" (a technical requirement, in the absence of which the case was treated as undefended), "if it should be made appear to the Court by affidavit, or be proved upon the trial in case the defendant appears, that more than half a year's rent was due before the said summons was served, and that no sufficient distress was to be found on the demised premises, and that the lessor or lessors in ejectment had power to re-enter; then the lessor or lessors in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded, and a re-entry made."

Had the section stopped there, as the summons in ejectment was to stand in the place of demand and re-entry, the lease would have been forfeited without any right of redemption. It, however, proceeds in terms which give the lessee a title in equity to relief against the forfeiture, in the event of his filing a bill within six calendar months, and paying the rent in arrear. The mode of *ascertaining* the amount of rent due, as distinguished from proving the *minimum* amount necessary to entitle the action to be sustained, was in relation to the right of the tenant to redeem. In the case of judgment against the casual ejector (which corresponds to our present judgment by default) the proof by affidavit was made *after*, and not before, the judgment was marked. In the other case—*i.e.*, where the defendant appeared at the trial—the lessor in ejectment should prove his right to recover for non-payment of rent, which involved proof of tenancy.

There is another matter which it may be necessary to consider in some future case, but as to which at present I say nothing.

Section 7 of the Land Law Act, 1887 (50 & 51 Vict. c. 33), changes the form of execution which can be awarded in a case such as the present; and as in the Civil Bill Court the execution is made part of the judgment, it is open to argument that evidence must be given at the hearing that the case is within the section which authorizes the particular execution. In the present case, by reason of the heading of the ejectment, no execution could have been directed, save that in conformity with the last-mentioned section; but to authorize such an execution proof should have been given that the case was within the section. It may seem very technical to say that the form of the process estopped the plaintiffs from alleging that the holding was not within that section, but that the defendant, though he did not appear, was not so estopped; but still that may be so. It may therefore be, that evidence was necessary to prove that this was a holding, agricultural or pastoral, or partly agricultural and partly pastoral.

As it must be taken that one person only, viz., the defendant, was in possession, I do not think it necessary to refer to the 12th section of the Act of 1896, which possibly may render necessary, in cases where more than one person is in possession, some proof as to the character of the possession of each such person.

I am of opinion that the dismiss should be affirmed.

ANDREWS, J., concurred.

JOHNSON, J.:—

The Landlord and Tenant Act, 1860, s. 52, empowers a landlord, to whom a year's rent, in respect of lands held under a contract of tenancy at a rent not exceeding £100 a-year, is in arrear, to proceed by ejectment in the Civil Bill Court, for recovery of possession of the lands, subject to the tenant's right to redeem. For this proceeding, section 53 requires that "a tenancy between the parties shall appear to exist, whether by original contract or by lawful assignment, devise, bequest, or act and operation of law." It is necessary, therefore, that the existence of this tenancy and its nature should be averred in the civil bill, and proved by legal evidence, so that it "shall appear" to the Court before which the case comes. Accordingly the Form of Civil Bill, No. 3, County

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Court (Ireland) Orders, 1890, contains the necessary averment. The 27 & 28 Vict. c. 99, s. 46, provides that in undefended ejectment for rent, the affidavit of the landlord or lessor, his agent, or receiver shall be "*admissible for ascertaining the amount of the rent due.*" That is, shall be admitted as evidence of the amount of rent due. This does not make it admissible or receivable in evidence for any other purpose. It follows, therefore, that notwithstanding the ejectment is not defended, the material averment in the civil bill of the nature or existence of the tenancy between the plaintiff and defendant must be proved by legal evidence to the Court. I therefore think that in the present case the existence of the tenancy and its nature did not "*appear*" to the Court, and that the civil bill was rightly dismissed, and that the question in the case submitted to the Court should be answered in the negative.

BOYD, J., concurred.

Solicitor for the plaintiff: *J. O'Connor.*

J. G. T.

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MURPHY *v.* THE BANDON CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY, LIMITED (1).

Landlord and tenant—Lease—Construction of—Exclusion of implied by express covenant.

In 1903 the plaintiff demised to the defendant Company certain lands for a term of years, subject, as to part of the lands, to a weekly tenancy created therein by the plaintiff, together with "all the right, benefit, and advantage" of the plaintiff, under a memorandum of agreement by which the said tenancy had been created. By the said memorandum of agreement the payment of the weekly rent had been guaranteed by two sureties; but prior to 1903 the sureties had been released by the plaintiff. During the negotiations for the lease of 1903, a copy of the said memorandum of agreement was sent to the defendant Company, but the release of the sureties was not disclosed by the plaintiff, nor was any requisition in relation to the contract of suretyship made

(1) Before MADDEN and BOYD, JJ.

by the defendant Company. The lease contained an express covenant by the plaintiff for quiet enjoyment, which did not make any reference to the said contract of suretyship. The defendant Company, having failed to recover the said weekly rent from the tenant, sued the sureties, who successfully relied on their release by the plaintiff. In an action by the plaintiff against the defendant Company for rent due under the lease of 1903, the defendant Company counterclaimed for damages for breach of contract to assign to them the full benefit of the said contract of suretyship, and for non-disclosure of the discharge of the sureties, but abandoned any claim founded on fraudulent concealment or misrepresentation:—

Held, that the presence in the lease of the above-mentioned express covenant negatived the existence of any implied covenant or warranty that, at the date when the lease was executed, the contract of suretyship was still valid and subsisting, even assuming that such a covenant could otherwise have been implied from the terms of the lease: as to which, *quære*.

CASE STATED by Johnson, J., at the County Cork Summer Assizes, 1907, on the hearing of a civil-bill appeal. The case stated was as follows:—

1. The civil bill was brought to recover £10, the amount of one year's rent claimed to be due to the plaintiff by the defendants down to the 1st February, 1907, out of certain premises in the town of Bandon. This sum was admittedly due; but the defendants relied on a counterclaim by notice for fraudulent misrepresentation and concealment, in respect of which they claimed £10 damages. The civil bill and notice of counterclaim are set out in the schedule hereto, (*d*) and (*e*). The County Court Judge dismissed the counterclaim, and granted a decree for the amount claimed, and from this decision the defendants appealed to the Assizes.

2. At the hearing on appeal the defendants' counterclaim, so far as it relied upon fraudulent concealment or misrepresentation, was abandoned; but the defendants claimed to be entitled to a sum, equal at least to the rent due, by way of damages up to the 28th March, 1907, for breach of contract and non-disclosure of the discharge of the sureties; and the pleading is to be taken as amended to raise this question only.

3. The following facts were proved or admitted on the appeal, and formed the common case of the parties. By a memorandum of agreement, dated the 5th September, 1895, made

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between Timothy Murphy (the plaintiff) of the first part, Timothy O'Keeffe of the second part, and John Buckley and Daniel O'Keeffe (hereinafter called the sureties) of the third part, the plaintiff let a small plot of ground to the said Timothy O'Keeffe at the weekly rent of 1*s.*, the payment of which was guaranteed by the sureties. This agreement is set out in the schedule hereto, (*a*).

4. Under the said agreement the said Timothy O'Keeffe entered into possession of the said plot, on which he erected and worked a blacksmith's forge, paying the reserved rent therefor; and he has since remained in occupation thereof.

5. On or about the 3rd December, 1898, the sureties obtained the plaintiff's signature to a document which had the effect of releasing them from all further liability under the agreement of the 5th September, 1895. This document is set out in the schedule hereto, (*b*).

6. On the 26th August, 1903, the indenture of demise in the schedule hereto, (*c*), was executed by the plaintiff and the defendants. For the purpose of carrying out this letting the plaintiff's solicitor submitted to the defendants a draft lease which recited the agreement of the 5th September, 1895. The defendants' solicitor then asked the plaintiff's solicitor to produce plaintiff's own lease of the lands in question, and the agreement of the 5th September, 1895; and these were produced. No questions were asked at the time, or requisition made, as to whether the obligation of the sureties remained in force. The plaintiff did not disclose the fact that the sureties had been released, nor mention that he had signed any document affecting the position of the parties; but he acted without fraud in the matter, honestly thinking that, if the discharge of the sureties from the sum guaranteed had been known to the defendants before the indenture of demise of the 26th August, 1903, was executed, it would have been regarded as a matter of no consequence by the defendants. In fact, the defendants did not know, and had not notice of the discharge of the sureties by the plaintiff until the civil-bill proceedings in the 7th paragraph hereinafter mentioned.

7. The defendants went into possession under their lease and paid to the plaintiff the rent reserved thereby, but were not able

to recover any rent from Timothy O'Keeffe, and sued the sureties therefor.

8. In this proceeding the sureties produced the release of the 3rd December, 1898, with the result that the defendants' claim against them was dismissed with costs; and the rent due by O'Keeffe is now irrecoverable.

9. Under these circumstances the defendants contend that they are entitled to recover, and to set off against the rent due by them to the plaintiff, damages for breach of contract by non-disclosure of the said discharge of the sureties before the execution of the said lease of the 26th August, 1903, and the loss they sustained in consequence thereof.

The plaintiff's case, on the other hand, is, that on the true construction of the lease, taken in connexion with the circumstances mentioned above, the contract between the parties has not been broken, and the non-disclosure was immaterial; and that consequently no damages are recoverable against him on the notice of counterclaim.

The Judge of Assize, without expressing any opinion, on the application of the plaintiff directed this case to be stated for the opinion of the Court of King's Bench, as the decision may affect the rights of the parties during the whole currency of the lease.

The question for the Court is, whether the defendants are entitled to any, and what amount of, damages in respect of the counterclaim put forward in their said notice of the 3rd April, 1907. If this question is decided in the affirmative, the County Court decree will be reversed in all or in part (as the case may be), and the counterclaim as amended allowed for £10, or such other sum as the Court of King's Bench may determine, with costs. If this question is decided in the negative, the County Court decree will be affirmed with costs.

W. M. JOHNSON.

7th December, 1908.

SCHEDULE OF DOCUMENTS INCORPORATED WITH THE CASE STATED.

(*a*) Memorandum of Agreement of weekly tenancy made the 5th September, 1895, between Timothy Murphy of the first part,

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Timothy O'Keeffe, blacksmith, of the second part, and John Buckley and Daniel O'Keeffe, of the third part.

(*b*) Release, dated the 3rd December, 1898, by Timothy Murphy, of Daniel O'Keeffe, from his obligation as security under the agreement of the 5th September, 1895.

(*c*) Indenture of demise dated the 26th August, 1903, between Timothy Murphy of the one part, and the Bandon and Co-operative Agricultural and Dairy Society of the other part.

(*d*) Civil bill of Timothy Murphy, plaintiff, against the Bandon Co-operative Agricultural and Dairy Society, defendants, dated the 28th March, 1907.

(*e*) Notice of set-off and counterclaim by the defendants, dated the 3rd April, 1907, in respect of the civil bill of the 28th March, 1907.

(*f*) Decree of the County Court Judge, dated the 10th June, 1907.

By the memorandum of agreement, dated September 5th, 1895, Timothy Murphy (the plaintiff) let the premises therein described to Timothy O'Keeffe, as tenant from week to week, at a weekly rent of one shilling, with a clause enabling either party to determine the said tenancy by one week's notice in writing, and the parties of the third part thereby jointly and severally promised and agreed with the said Timothy Murphy, his heirs, executors, administrators, and assigns, that they would at all times thereafter pay to the said Timothy Murphy, his heirs, executors, administrators, and assigns, the weekly rent reserved thereby, and all arrears thereof in the event of the said Timothy O'Keeffe making default in paying the same as it became due.

The premises, the subject of the letting by the said memorandum of agreement, formed part of the premises demised by the indenture of August 26th, 1903.

By the said indenture made between the said Timothy Murphy of the one part, and the Bandon Co-operative Agricultural and Dairy Society, Limited (therein called "The Society, Limited"), of the other part, after reciting that the premises thereby intended

to be demised were held by the said Timothy Murphy under an indenture of grant in perpetuity, dated December 31st, 1899, subject to the yearly rent of £12, and reciting the agreement for the lease thereby granted, it was witnessed that in consideration of the rents and covenants therein reserved and contained the said Timothy Murphy thereby "demised, granted, set, and to farm let unto the Society, Limited," All That the premises therein described, "subject, however, as regards that portion of the said demised premises in the occupation of one Timothy O'Keeffe, to the weekly tenancy of the said Timothy O'Keeffe, and to the other rights reserved to him by an agreement made 5th September, 1895, between the said Timothy Murphy of the first part, the said Timothy O'Keeffe of the second part, and John Buckley and Daniel O'Keeffe of the third part," and subject also to a proviso enabling The Society, Limited, to determine the term thereby granted at the end of the third or any succeeding period of three years of the said term by giving three months' previous notice in writing "To have and to hold the said demised premises, subject as aforesaid, together with the rights, members, and appurtenances thereunto belonging, together also with all the right, benefit, and advantage of the said Timothy Murphy, under the said agreement of September 5th, 1895, and the rent to accrue due by the said Timothy O'Keeffe under the same, unto The Society, Limited, their successors and assigns, for the term of fifty years," at the yearly rent of £10.

The said indenture contained covenants in the usual form by "The Society, Limited," to pay the rent thereby reserved, and all the rates and taxes, and to keep the demised premises in repair. It also contained a proviso enabling "The Society, Limited," to erect on the premises thereby demised buildings, works, factories, machinery and plant, for the purposes of their trade or business, and at the end, or sooner determination of the demise, to remove the same, "except the permanent buildings which may be erected by them on the said demised premises, for which said buildings the said Timothy Murphy, his heirs and assigns," agreed to compensate "The Society, Limited, their successors and assigns," in such sum as might be fixed under the agreement for arbitration therein contained.

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The said indenture contained the following express covenants on the part of the said Timothy Murphy:—

(1) A covenant to pay the rent, and observe the covenants in the perpetuity grant of December 31st, 1899, contained, and to keep "The Society, Limited," indemnified therefrom.

(2) "And also that The Society, Limited, their successors and assigns, paying the said yearly rent hereby reserved, and performing the covenants hereinbefore contained, shall and may peaceably and quietly have, hold, and enjoy the said demised premises, with the appurtenances, subject as aforesaid, during the term hereby granted, without any let, hindrance, interruption, or disturbance of the said Timothy Murphy, his heirs or assigns, or any other person or persons claiming or deriving from or under him, them, or any of them."

The nature and contents of the other documents enumerated in the schedule appear sufficiently in the case stated.

W. S. Norwood (*H D. Conner, K.C.*, with him), for the plaintiff:—

The claim of the defendant Company is expressly limited to damages for what is, in effect, an implied covenant for title arising from the terms of the demise. No requisition was made as to the validity of the contract of suretyship created by the memorandum of agreement of 1895. The implied covenant upon which the defendant company relies is excluded by the express covenants contained in the lease: see the judgments of Cotton and Bowen, L.JJ., in *Clayton* v. *Leech* (1).

G. M'Sweeney (*A.M. Sullivan, K.C.*, with him), for the defendants:—

The counterclaim is for damages for breach of contract to assign to the defendant Company the full right and benefit of the contract of suretyship created by the memorandum of agreement of 1895. I submit that the words in the lease, "together with all the right, benefit, and advantage of the said Timothy Murphy under the said agreement of September 5th, 1905," amount to an

(1) 41 Ch. D. 103, at p. 107.

assignment of the benefit of the contract of suretyship thereby created; and that the terms of the grant amount to a representation or warranty that the contract of suretyship was valid and subsisting when the lease was executed: see the definition of a warranty at p. 3 of Leake on Contracts, and also the judgment of Williams, J., at p. 755 of *Behn* v. *Burness* (1). The defendant Company can succeed without establishing fraud on the part of the plaintiff. "But, apart from fraud, and except in the case of contracts *uberrimae fidei*, a representation, at common law, could only affect a contract if it amounted to a warranty or *promise* of the truth of the fact stated,' and so formed part of the whole agreement entered into . . . If it did form part of the contract, it might be an essential term thereof going to the whole substance of the contract . . . or it might be a term independent of the parties' main agreement—that is to say, a stipulation, on the performance of which the performance of the rest of the contract was not dependent. . . . In the latter case, the party misled was not justified in repudiating the contract if the statement proved untrue; he was obliged to perform the main agreement; but he was entitled to damages for breach of warranty committed": Williams on Vendor and Purchaser, vol. ii, p. 724.

Norwood was not called on to reply.

MADDEN, J.:—

We do not think it necessary to call on counsel for the plaintiff to reply, as the arguments on both sides have been very clearly put before us.

The case really turns on the construction to be given to the lease of the 26th August, 1903, made between the plaintiff and the defendant Company.

I agree with Mr. M'Sweeney's contention, that if the lease contained any covenant amounting to a warranty that the contract of suretyship created by the agreement of the 5th September, 1895, was still in force at the date of the lease, the lessee would, in the circumstances of this case, have a right to recover damages against

(1) 3 B. & S. 751.

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the lessor for breach of warranty; but the rules governing the interpretation of documents such as the lease in question have been too long established to be now questioned.

It appears from the lease that the premises to which it relates were demised subject to a weekly tenancy to one Timothy O'Keeffe. Under the memorandum of agreement by which the weekly tenancy was created, the payment of the weekly rent was guaranteed by two persons who were parties thereto in the capacity of sureties for Timothy O'Keeffe. It appears from the lease that the lessor is tenant of the demised premises under a perpetuity grant, dated the 31st December, 1899. The case stated finds as a fact that, prior to the execution of the lease in question, the lessor had discharged the sureties from the liability under the agreement of 1895, but the lease is silent on this point, and the lessee was not informed of the fact. Now, I fully accept the defendant's contention that, in withholding this information, the lessor was guilty of suppressing a material fact. For this wrong the law affords two remedies. The defendant Company might bring an action to avoid the lease; but as extensive premises have been erected on the lands, that remedy would be useless. An alternative remedy might be obtained by means of a common law action for deceit; but the case stated contains a finding that the plea of fraudulent concealment or misrepresentation has been abandoned. The contention of counsel for the defendant Company is, that there is a third remedy open to the Company. He contends that the terms of the lease amount to a covenant, or warranty, that, at the date when it was made, the contract of suretyship was still valid and subsisting; and that the defendants are entitled to damages for breach of this covenant which can be set off against the rent.

The lease of 1903 states that part of the premises thereby demised are sublet to Timothy O'Keeffe, and the premises are granted "subject to the weekly tenancy of Timothy O'Keeffe and of the other rights reserved to him by the agreement of the 5th September, 1895," to hold the same. "together with all the right, benefit, and advantage of the lessor under the said agreement of the 5th September, 1895, and the rent to accrue due by the said Timothy O'Keeffe under the same," as from the date of the demise.

The effect of this grant is to convey all the rights which the lessor then had under the agreement of the 5th September, 1895, and I shall assume in favour of the defendant Company that it operates to convey the benefit of the suretyship created by the said agreement; but what are the covenants in the lease?

The document is carefully drawn. It contains a covenant by the lessor to pay the rent reserved by the indenture of the perpetuity grant of the 31st December, 1899, and to observe the covenants and conditions therein contained, and to keep the lessee indemnified therefrom. Then comes the following covenant for quiet enjoyment:—That the lessee, paying the rent thereby reserved, and performing the covenants thereinbefore contained, "shall and may peaceably and quietly have, hold, and enjoy the said demised premises, with the appurtenances, subject as aforesaid, during the term hereby granted, without any let, hindrance, interruption, or disturbance of the said Timothy Murphy, his heirs or assigns, or any other person or persons claiming or deriving from or under him, them, or any of them." The lease contains no other covenants by the lessor.

The presence in the lease of these express covenants is sufficient to negative the existence of any implied covenant such as that on which the defendant Company relies, even if the words of the lease were capable of bearing the interpretation which they seek to put upon them. It is settled that the existence of express covenants for title excludes the operation of covenants which arise only by implication. One of the authorities on this point is *Clayton* v. *Leech* (1), cited by Mr. Norwood, in which that proposition is thus stated by Bowen, L.J.:—"The implied covenant, which would have arisen from the demise, is excluded by the express qualified covenant for quiet enjoyment." And he added that the lessee in that case could not have any right to compensation, unless there were some stipulation entitling him to claim it.

The language of Bowen, L.J., is important, as he was dealing with a case where, but for the existence of an express covenant, there would clearly have been an implied covenant, which would

(1) 41 Ch. D. 103.

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have supported the lessee's claim for compensation—a state of facts which, for the purpose of this part of my judgment, I assume, but do not decide, to exist in the present case.

The passage cited by Mr. M'Sweeney from Williams' Vendor and Purchaser, vol. ii., pp. 723, 724, would be relevant if the lease to the defendant Company had contained anything in the nature of a warranty, for breach of which damages could have been recovered.

The defendant Company cannot "recover damages for a breach of warranty committed," unless it can be shown that some covenant equivalent to a warranty arises by implication from the lease; but, even if the lease before us would bear that construction—which I very much doubt—the implied covenant would, in the present case, be excluded by the express covenant to which I have already referred.

BOYD, J., concurred.

Solicitor for the plaintiff: *Thomas Scanlan.*
Solicitor for the defendants: *T. J. O'Driscoll.*

J. C. W.

REEVES *v.* REEVES (1).

K. B. Div.
Probate.
1909.
Jan. 14–16.
Feb. 26.

Probate—Revocation—Two partly inconsistent wills admitted to probate—Execution of limited power of appointment—Intention—Power to look at original will.

Where a subsequent testamentary paper is only partly inconsistent with one of earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both papers are admitted to probate.

A testatrix having property of her own, and a power under the will of her sister R. to appoint all her property amongst brothers or sisters, or children of a deceased brother or sister, executed the power by giving pecuniary legacies to nephews and nieces, and appointing the residue to her nephew T., to whom she left the residue of her own property, including "Tramore House and grounds," and appointed executors.

By a will in her own handwriting, made two years later, containing no express reference to the earlier will, the testatrix purported to exercise the power of appointment, increasing and varying the pecuniary legacies, but omitting, as the Court held, to name a residuary legatee. She left the residue of her own property to her nephew T., in the hope that he would find it for his advantage to live in "Tramore House." There was no appointment of executors. Tramore House and grounds belonged, as to three-fourths, to the testatrix, and, as to one-fourth, to her sister R.:—

Held, that there was no intention to revoke the appointment of executors and of the residue of R.'s property to T., and that the two wills could stand together, and should be admitted to probate.

Lemage v. *Goodban* (L. R. 1 P. & D. 57), *Leslie* v. *Leslie* (I. R. 6 Eq. 322), and *Townsend* v. *Moore* ([1905] P. 66) followed.

In order to construe a doubtful clause in a will, the Court may look at the original will to ascertain the punctuation, the introduction of capital letters, parentheses, and other marks, indicating where a sentence begins or ends.

Manning v. *Purcell* (7 D. M. & G. 55; 24 L. J., Ch. 523) and *Turner* v. *Hellard* (30 Ch. D. 390) followed.

TRIAL OF ACTION.

This action was brought to establish as the will of Mary Reeves two testamentary documents, dated respectively the 24th April, 1903, and 28th August, 1905.

(1) Before KENNY, J.

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These wills were in the words and figures following :—

"This is the last will and testament of me, Mary Reeves, of Tramore, Douglas, Cork, spinster. I hereby revoke all former wills and testamentary instruments or writings made or executed by me. I direct my just debts, funeral and testamentary expenses, to be paid ; and whereas my late sister Rebecca Morgan Reeves by her will, dated the nineteenth November, one thousand eight hundred and sixty-eight, after giving certain pecuniary legacies and making certain specific bequests as therein, gave, devised, and bequeathed all the rest and residue of her property that she might be possessed of or entitled to at the time of her death, to her eldest unmarried sister upon trust for her own use, and the use of her other unmarried sisters, as long as they should live together and unmarried, and she thereby ordered that any of them marrying or leaving the house (*i.e.*, Tramore House) should cease to have any interest in the same, and she left the entire absolutely to the survivor of the three who should remain unmarried, to be hers until she married, and to be divided by her at her marriage by appointment, or at her death by will, among her brothers and sisters, or the children of any deceased brother or sister in such shares as she should see right. And whereas I was the eldest and am the last survivor of said unmarried sisters, now in pursuance of the power to me given by said will of my said sister Rebecca, and of all other powers me hereunto enabling, I appoint, devise, and bequeath all and whatsoever property real and personal, moneys and securities comprised in or vested in me, or over which I have disposing power under or by virtue of said will, in manner following, that is to say, to my dear brother Isaac, five pounds ; to my dear sister Elizabeth, five pounds ; to John Somerville and Annie, the children of my sister Anna Lindsay, five pounds each ; to Rebecca Hill, one hundred pounds ; to Rebecca, daughter of my late brother Somerville, one hundred pounds ; and to her sister Mary and brother Somerville, five pounds each ; to each of the daughters of my dear sister, Elizabeth Fleming, five pounds each ; to Patty, Elsie, and Bob, children of my dear brother, Isaac, five pounds each, and to his eldest son Tom the residue of said property, real and personal, moneys and securities, including the two houses in Great George's Street, which belonged to my

said sister Rebecca, number three let to Mr. Stack, and number five to Mr. Buckley and Mr. Faris, and also the property at Douglas, purchased by me from Mr. Dan Stoker out of moneys comprised in my said sister Rebecca's will. And whereas, my late sister Henrietta H. Reeves, deceased, by her will dated the thirty-first December, one thousand nine hundred and one, left all she died possessed of unto me for my own use, with a request to pay the legacies therein mentioned as soon as I conveniently could; now I hereby devise and bequeath to my dear nephew Thomas Somerville Reeves (son of my late dear brother Somerville) the lands of Monerea Marsh, referred to in said will, viz., Bandon Terminus, Tramway Terminus, and McSweeney's Yard, also the four houses at Tivoli, subject to an annuity of twenty pounds to be paid to my dear cousin Lily Jellett for her life as expressed in said will of my sister Henrietta, and I devise and bequeath unto my dear nephew Robert Clanmalier Reeves the three houses in Great George's Street and the shares in the Bandon Railway, all of which belonged to my said sister Henrietta, as mentioned in her said will, the said respective hereditaments and premises and shares to absolutely vest in my said nephews, respectively, as hereby devised and bequeathed to them respectively, on my decease; and I bequeath and direct that all other the specific and pecuniary legacies and bequests referred to in my said sister Henrietta's will, or such of them as shall not have been paid, discharged, and distributed by me during my life, shall upon my decease be paid, discharged, and distributed to the persons in that behalf named and as specified in my said sister Henrietta's will. I leave and bequeath to my niece Patty Reeves my necklace of one hundred pearls, and to my niece Elsie my emerald ring. And whereas my dear brother, the Dean of Ross, has heretofore lent me the sum of two thousand five hundred pounds to pay off a mortgage affecting that portion of the lands of Rockboro', my property, which the Cork Gas Consumers Company held from me as tenants, which sum remains due and owing by me to my said brother, now, I hereby subject and charge all my estate and interest in said lands of Rockboro' with said sum of two thousand five hundred pounds with interest thereon at the rate of four per cent. per annum from the date of my decease, and subject thereto

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I give, devise, and bequeath all my estate and interest in said lands of Rockboro' unto my said brother the Dean of Ross, and it is my wish that he should settle same upon or for the use and benefit of his daughter Elsie. And as to all the rest residue and remainder of my property, real and personal, goods, chattels and effects, including Tramore House and grounds as it stands and all it contains, I give, devise and bequeath the same to my said dear nephew, Thomas Somerville Reeves (son of the Dean of Ross), his executors, administrators, and assigns, absolutely, it being my desire that he should live at Tramore and fill the place towards his family and the parish, which our family have long endeavoured to fill, and I hope he will keep on or pension any of the following servants who may be in my service at my decease, namely:—James Ahern, William Copithorne, Thomas Wilson, Mary Farr, and Mary Brien; and I appoint my said nephews Thomas Somerville Reeves (son of the Dean of Ross) and Thomas Somerville Reeves (son of my brother the Reverend James Somerville Reeves) and Robert Clanmalier Reeves, executors hereof. In testimony whereof I have hereunto signed my name this twenty-fourth day of April, one thousand nine hundred and three. Signed, published, and declared by the said testatrix, Mary Reeves, as, and for her last will and testament, in the presence of us, who, in her presence, at her request, and in the presence of each other, all being present at the same time, have hereunto subscribed our names as witnesses. T. J. BABINGTON, solicitor, Cork. JOHN O'CONNOR, solicitor's assistant, Cork. MARY REEVES."

"The last will and testament of Mary Reeves, Tramore, Douglas, Cork. *In te Domine speravi.* I, Mary Reeves, do make this my last will and testament: Whereas, my late sister, Rebecca Morgan Reeves, by her will, dated November 19th, 1868, left all she died possessed of to her eldest unmarried sister for the benefit of herself and of her unmarried sisters, and finally to belong to her last unmarried sister, to be divided by her by will, as she pleased, among her brothers and sisters or their children. I now bequeath out of her property the sum of one hundred pounds to each of my dear brother Somerville's children—to Rebecca Hill, my niece, £100—to the Rev. T. S. Lindsay, and

to his sister Annie, £5 each—to Elsie, Patty, and Bob, the children of my dear brother Isaac, £5 each—to my dear sister Elizabeth Fleming, and each of her daughters, £5 each,—and the residue of her property, consisting of No. 3 and No. 5 Great George's Street, Cork, together with the lands and houses which I purchased from Dan Stoker, round Douglas, and paid for after my sister Henrietta's death, as an investment of Rebecca's money, with all the reclamations, buildings, and improvements, to make it profitable, as it now is—I leave to Mrs. Adelaide Reeves, the widow of my dear brother Isaac, Dean of Ross, my lands of Rockboro' on which the gas-works and some houses stand, and for which the Cork Gas Consumers Company pay me rent, net about £174 per annum. This legacy is for payment of a debt of £2,500 which I owe him, her husband, my late dear brother Isaac, having lent me £2,500 to pay off a mortgage of £2,500 with which the property was charged when I bought it: Mrs. Reeves will therefore have to pay duty only on the balance of the value of the property, as the rest belongs to her already—and this £2,500 is one of my just and lawful debts, and must be deducted from the value of my property. I leave my pearl necklace, consisting of one hundred pearls, to my niece Elsie, and my emerald ring to my niece Patty, daughters of the late Dean of Ross, my brother Isaac; both of these are heir-looms, not to be parted with out of the family. As to the rest and residue of my property, I leave it to my dear nephew, Thomas Somerville Reeves, the eldest son of my brother Isaac, in hopes that he will find it for his advantage (as it will be) to live in Tramore House, and also that he will fill the place which his family have long held towards the parish. Also, I wish to inform him that his grandfather, who built the house of Tramore, had a great objection to an auction or sale of furniture, books, plate, china, or family relics, and asked his children not to hold an auction here. I leave to the care of my dear nephew Tom the following servants who may be in my service at the time of my death—James Ahern, Mary Farr, Mary Brien, Thomas Wilson, and William Copithorne, all of whom have served me faithfully and well, and I ask him to employ them as long as they continue to serve him well, and when each of the first four mentioned becomes too

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old for service, to give him or her a pension of £12 a year. Copithorne is still a young man. I rely on my nephew Tom to carry out my wishes as regards these servants. Signed, published, and declared, by the said testatrix, Mary Reeves, to be her last will and testament, in the presence of us, who are in her presence, and in the presence of each other, at the same time, and at her request, have hereunto subscribed our names as witnesses. August 28th, 1905.—MARY REEVES. Witnesses, GEORGE P. QUICK, M.A., Rector of Douglas, Cork; WILLIAM F. BENSON, M.A., Clk., Douglas Rectory, Cork."

The action was tried before Kenny, J., without a jury, on January 14th, 15th, and 16th, 1909. Judgment was reserved, and delivered on February 26th, 1909.

The facts of the case, and the authorities referred to by counsel, are sufficiently stated in the judgment.

Ronan, K.C., H. D. Conner, K.C., and *Hon. Cecil Atkinson*, for the plaintiffs.

Henry, K.C., and *Corvan*, for the defendants, Elizabeth Fleming and Elizabeth Somerville Large.

Feb. 26.

KENNY, J.:—

This suit has been instituted for the purpose of establishing as the will of the testatrix, Mary Reeves, two testamentary documents, dated respectively the 24th April, 1903, and 28th August, 1905. The plaintiffs and the defendant, Thomas Somerville Reeves, are named as executors in the former document, notwithstanding which, administration with the will of the 28th August, 1905, alone annexed was on the 30th April, 1906, granted to the said defendant. He has delivered no defence, nor has he appeared by counsel or solicitor at the trial, but it is his interest that both documents should be admitted to probate. The other defendants are, respectively, his sister, Mrs. Fleming and her daughter, who are appointees named in each document. In addition, a contention with reference to the construction and effect of the document of the 28th August, 1905, has been put forward on behalf of the defendant, Mrs.

Fleming, which, if sustained, would, in the main, if not altogether, effectually exclude the earlier will from recognition. Furthermore, the defendants, T. S. Reeves and Mrs. Fleming, are objects of the power of appointment which the testatrix purported to exercise, and are members of the class who would take in default of appointment.

In those circumstances the statement of claim asks that the administration with the will annexed of the 28th August, 1905, already obtained by the defendant, T. S. Reeves, be recalled, and that probate of both documents be granted, while the defendants Mrs. Fleming and Mrs. Large claim that the later of the two documents should alone be admitted to proof.

The question for determination therefore is, whether the will of the 28th August, 1905, expressly or in effect revokes, either wholly or partially, the will of the 24th April, 1903, or is so inconsistent with it that the two documents cannot stand together.

The history of the Reeves family, the derivation of the property that was subject to the disposition of the testatrix, and the circumstances under which the two documents were executed, are as follows:—

Thomas S. Reeves the first, of Tramore House, county Cork, who died about the year 1868, left two sons and six daughters surviving him. The sons were the Rev. Isaac Reeves—afterwards Dean of Ross—and the Rev. James Somerville Reeves, both now deceased. The defendant Thomas Somerville Reeves the second is a son of the Dean of Ross, and the plaintiff Thomas S. Reeves the third is a son of the said James S. Reeves. Of the six daughters only one survives, namely, the defendant, Elizabeth Fleming. One other daughter—Mrs. Lindsay—married, and died leaving children. The remaining four, namely, Rebecca, Henrietta, Susanna, and Mary, died unmarried, the testatrix, Mary Reeves, being the survivor.

Thomas S. Reeves the first, by his will dated the 19th November, 1862, after making provision for, *inter alia*, his four unmarried daughters, devised and bequeathed the residue of his property to them as tenants in common in equal shares, and the said will was duly proved on the 21st May, 1869. The testator's

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house and lands of Tramore House, containing about 20 acres, passed under this bequest of his residue.

Rebecca Reeves, one of the unmarried daughters, by her will, dated the 19th November, 1868, devised and bequeathed the residue of her property to her eldest unmarried sister, Mary Reeves, the testatrix in this suit, upon trust for her own use and the use of her other unmarried sisters as long as they should live together and unmarried; and the testatrix thereby declared that any one of them marrying or leaving the house should cease to have any interest in the same; and the testatrix left the entire absolutely to the survivor of the three who should remain unmarried, to be hers until she married, and to be divided by her at her marriage by appointment, or at her death by will, among the brothers and sisters of the said testatrix, *or* the children of any deceased brother or sister, in such shares as she should see right. The testatrix died on the 16th April, 1870, and her said will was duly proved by her executors on the 27th June, 1870.

At the time of Rebecca Reeves's death a probate suit was pending with reference to the aforesaid will of her father, Thomas S. Reeves the first, who on the 19th November, 1867, had purported to execute another will whereby (*inter alia*) he specifically devised his aforesaid house and lands of Tramore House to his said four unmarried daughters as a residence during their lives so long as they remained unmarried, and devised the reversion of the same to the longest liver remaining unmarried, and bequeathed the residue of his property to the same ladies in equal shares as tenants in common. The said suit was compromised by a deed bearing date the 18th July, 1870, to which all the children were parties except Rebecca (who had died), whereby they agreed to confirm the said will of the 19th November, 1867, and thereby transferred to a trustee all the property that passed under the will of 1862—to be held by him to the uses and upon the trusts upon which the same should be held if the will of 1867 had been duly proved as the last will and testament of the said Thomas S. Reeves the first.

The result of this arrangement, so far as Tramore House and lands were concerned, was that as to three-fourths they passed to the three unmarried daughters and eventually to the survivor of

them, viz., Mary; and as to the remaining one-fourth, it remained subject to the provisions of the will of 1862 of Thomas S. Reeves the first, and captured by the provisions of Rebecca's will. It consequently passed eventually to Mary for life, with the power of appointment given by the last-mentioned will.

Henrietta Reeves made her will dated the 31st December, 1901, whereby she left all she died possessed of to her sister, Mary, for her own use, and then followed these words, "but I would ask her to pay the legacies now mentioned as soon as she conveniently can." Then followed a number of specific and pecuniary legacies, and towards the close of the will she adds: "I wish Tom Reeves to get Tramore, and keep it up as it is—books and all." She died on the 19th August, 1902, and her will was duly proved. It would seem as if she regarded Tramore as part of the property she could dispose of, notwithstanding the deed of the 15th July, 1870. It is also clear that her universal legatee, Mary Reeves, rightly or wrongly considered that she took the property bequeathed to her unhampered by any trust.

It is important to mention that the testatrix in the present case invested portion of the moneys that passed by the will of Rebecca in the purchase from a Mr. Dan Stoker of land and houses at Douglas in the county of Cork. The lands so purchased comprised about 60 acres and adjoined Tramore House and demesne. Evidence was given that the testatrix treated those lands as a home farm and as part of the Tramore demesne, and expended considerable sums on them in the way of improvements—such moneys being also portion of the estate of Rebecca.

The will of the testatrix Mary Reeves dated the 24th April, 1903, has been duly proved before me. By it she purports to appoint the property left by Rebecca, and also to dispose of her own. She revokes all former wills—recites the will of Rebecca, and then proceeds to leave, by way of appointment, a number of sums to her brother Isaac—her sister, the defendant Mrs. Fleming, and to several nephews and nieces. The residue, she devised and bequeathed to the defendant Thomas S. Reeves by the following description:—"The residue of said property, real and personal, moneys and securities, including the two houses in Great

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George's Street, which belonged to my sister, Rebecca, No. 3 let to Mr. Stack, and No. 5 let to Mr. Buckley and Mr. Faris, and also the property at Douglas, purchased by me from Mr. Dan Stoker out of monies comprised in my said sister Rebecca's will." The testatrix then proceeded to dispose of portions of the property so left by her said sister Henrietta, and bequeathed to her niece Patty Reeves (a daughter of her said brother Isaac) her necklace of 100 pearls, and to her niece Elsie (another daughter of Isaac) her emerald ring. She charged her lands of Rockboro' with a sum of £2,500, due by her to her said brother Isaac, and, subject thereto, devised and bequeathed said lands to her said brother, with a wish that he should settle same for the use of his said daughter Elsie, and as to all the residue of her property, "including Tramore House and grounds, as it stands and all it contains," she devised and bequeathed the same to the defendant Thomas S. Reeves, it being her desire that he should live at Tramore. The testatrix appointed the defendant Thomas S. Reeves and the plaintiffs executors of the will.

It is manifest that neither the defendant Thomas S. Reeves nor the children of Mrs. Fleming were, at the date of the will, objects of the power contained in the will of Rebecca.

About the middle of the month of May, 1905, the brother of the testatrix, the Reverend Isaac Reeves, died; and on the 28th August, 1905, she executed the will of that date, which has been, as I have said, already admitted to proof in common form. It is all in her own handwriting, and it differs in many essential respects from the previous will of 1903, which she had in her possession, and which I would conjecture she had before her when she was drawing the will of August, 1905. This will of 1905 commenced with the words—"The last will and testament of Mary Reeves, Tramore, Douglas, Cork. *In te Domine speravi.* I, Mary Reeves, do make this my last will and testament." It then purports to recite the will of Rebecca, but does so incorrectly in stating the objects of the power of appointment to be "her brothers and sisters, or their children," the real objects being "brothers and sisters, or the children of any *deceased* brother or sister." She then bequeaths, by way of appointment, several sums of money to the same persons (except her brother Isaac) as those to whom she had made pecuniary appoint-

ments by the will of 1903, but in the case of her niece and nephew, Mary Reeves and Somerville Reeves (children of her brother, the Reverend James S. Reeves, deceased), the gifts of £5 each were increased to £100 each. Her last pecuniary appointment, and that of the residue of Rebecca's property, are then dealt with as follows :—"To my dear sister, Elizabeth Fleming, and each of her daughters, £5 each—and the residue of her property, consisting of No. 3 and No. 5 Great George's Street, Cork, together with the lands and houses which I purchased from Dan Stoker round Douglas and paid for after my sister Henrietta's death as an investment of Rebecca's money, with all the reclamations, buildings, and improvements, to make it profitable, as it now is."

No further name of an appointee appears; and unless, as has been contended, the defendant, Mrs. Fleming, and her daughters take this residue, the testatrix appears to have blundered by omitting altogether the name of the person to whom this residue was to go.

The will omits all reference to the will and property of Henrietta. It bequeathes to Elsie Reeves the pearl necklace which, by the will of 1903, was left to Patty Reeves, and the emerald ring is bequeathed to the latter. She leaves the lands of Rockboro' to the widow of her brother Isaac, "in payment of a debt of £2500 which I owe him, her husband having lent me £2500 to pay off a mortgage," and as to the residue of her property she left it to the defendant, Thomas S. Reeves, "in hopes that he will find it for his advantage (as it will be) to live in Tramore House."

The will made no appointment of executors. The testatrix died on the 12th February, 1906; and the due execution of this will as a testamentary document has been proved before me.

Oral evidence was given on behalf of the plaintiffs of the circumstances under which the will of 1905 was made, and of the expressed intention of the testatrix. Evidence of statements made by the testatrix after the execution of that will was also offered. Though I had considerable doubt as to its legality, I thought it safer to receive it, and did so subject to objection by the defendants' counsel. I need not go through the details of the oral evidence. It is enough for me to say that I was satisfied

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that the testatrix intended to add the land at Douglas which she had bought from Stoker to the Tramore property, and that, so far as the latter, in its entirety, was concerned, and down at least to the 23rd May, 1905, when she had an interview with her solicitor, Mr. Babington, she had no intention of making any alteration in that portion of the will of 1903, under which the residue of Rebecca's property was appointed to the defendant, Thomas S. Reeves. On the occasion of that interview she informed Mr. Babington that she wanted to make an alteration in the will of 1903, by leaving Rockboro' to her deceased brother's widow, and that she did not intend to make any other alteration in her said will. Mr. Babington informed her she could effect the proposed alteration by a codicil. He deposed that she knew well what a codicil was, and that she had the will of 1903 in her own possession. It was further proved that a memorandum, dated the 17th May, 1905, and a list of property, dated 26th August, 1905 (two days before the will of 1905) were found amongst her papers, tied together. This memorandum is strongly confirmatory of her intention down to the 26th August to make the defendant T. S. Reeves her chief beneficiary, and to constitute him the owner of Tramore House. In it she states that she will add to this memorandum a clear list of the property which he will inherit after her death. The list of the 26th August is headed "a new list of my property," but it will be observed that it includes Nos. 3 and 5 Great George's Street which was part of Rebecca's property and over which she had only a power of appointment, and that it omits all mention of Tramore House and lands, though it does include some, if not all, of the lands bought from Stoker, under the items Douglas Villas, Conroy's field, rent of Café, and large field. Neither does it refer to the improvements which she had made on the Stoker lands. It was stated in the course of the trial that the residue of Rebecca's property which remained unappointed by the will of 1905 in the event of the Flemings being held not to be designated as the appointees consists of (1) one-fourth of Tramore House and lands; (2) the lands of Douglas; (3) Nos. 3 and 5 Great George's Street, Cork; and (4) the money laid out on improvements on Douglas, and that the value of such residue was between £3000 and £4000.

The question therefore arises for determination, whether the will of 1905 alone is to be admitted to proof in solemn form, or whether for probate purposes it must be taken in conjunction with the will of 1903, either wholly or partially. The plaintiffs contend that the appointments of executors and of the residue of Rebecca's property made by the latter have not been revoked either expressly or impliedly by the will of 1905, while the defendants Mrs. Fleming and her daughter say that the will of 1905 is complete in itself—that it disposes of all property that belonged to the testatrix as her own, or over which she had a power of appointment—and that it was intended to be, and is, a substitution for the earlier will. If it failed on its true construction to operate as a complete execution of the power of appointment conferred by the will of Rebecca, it is submitted by these defendants that though the unappointed residue may go as in default of appointment, the will of 1903 can under no circumstances be regarded as an unrevoked testamentary disposition.

The question whether the Flemings are the designated residuary appointees of Rebecca's property is one of construction, and for the purpose of determining it I think I am entitled to look at the original will with a view to see "whether anything there appearing, as, for instance, the mode in which it was written, how dashed and stopped," could be a guide to the true interpretation. (See the statement of Lord Eldon's practice by Knight Bruce, L.J., in *Manning* v. *Purcell* (1).) To do so, no doubt, is opposed to the dictum of Sir William Grant in *Sandford* v. *Raikes* (2), adopted by Lord Westbury in *Gordon* v. *Gordon* (3), that his decision could not depend on the grammatical skill of the writer, and that it was from the words and from the context, and not from the punctuation, that the meaning of the testator was to be collected. But, according to Mr. Jarman (1 Jarman on Wills, 4th edition, p. 29), notwithstanding those considerable authorities, no hesitation has, in recent times, being felt by the Courts in following Lord Eldon's rule. This statement is fully borne out by the judgment of the majority of the Court of Appeal in *Turner* v. *Heliard* (4), where

(1) 7 De G. M. & G. 55; 24 L. J., Ch. 523, note (1).
(2) 1 Mer. 651. (3) L. R. 5 H. L. at p. 276. (4) 30 Ch. D. 390.

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there was a blank in the will for the name of the residuary devisee and legatee. Lord Esher, M.R., in giving judgment in that case, says:—"In my opinion, where you have to construe a disputed will, you must look at the will and read it. You must use your eyes as one of the means given you to enable you to construe what people have said. . . . I know of no rule that, for the purpose of construing a will, you may not look at the original will itself." If the original will be looked at, why should not stops, dashes, parentheses, paragraphing, and the structure of sentences be regarded? In a number of the earlier cases it will be found that much reliance was placed on punctuation, and on the formation and position of sentences (see *Compton* v. *Bloxham* (1); *Child* v. *Elsworth* (2); *Gauntlett* v. *Carter* (3)). Now, looking at the original will of 1905, I find that a "dash"(4) has been used by the testatrix at the close of each of the appointments immediately preceding the money gifts to the Flemings, and that each of those appointments commences with the word "to," followed by the name of the appointee, and is absolutely self-contained. The money gift to the Flemings is in precisely the same form, save that a comma is added after the words "£5 each." The dash is there, and if the dash in the previous gifts indicates the close of one appointment and the beginning of another, I see no reason to suppose that its insertion here could have any different object. There is no context that can help on this question of construction. I confess that, if the words of the money gift and of the description of the residue formed one continuous sentence, without comma or dash separating them, I would find it impossible, no matter how unlikely I might think it, not to hold that, as a matter of construction, the residue also passed to the Flemings. But, in my opinion, the intrinsic evidence on the face of the will shows that the Flemings were not, by the language used, contemplated as appointees of the residue; and I have come to the conclusion that the sentence dealing with the latter is an independent one, so far as the intended beneficiary

(1) 2 Coll. 201. (2) 2 De G. M. & G. 679. (3) 17 Beav. 590.

(4) It has not been possible to make a *facsimile* of the will. The judgment, however, of Mr. Justice Kenny will, it is hoped, sufficiently indicate the peculiarities which, in addition to the words, influenced his construction.—[REP.]

is concerned, and that the testatrix has, through an oversight, omitted the name. If the matter were not absolutely clear, it may be regarded from the point of view of being open to doubt, and if it is uncertain whether the Flemings take, or whether there is an omission, then an ambiguity arises, and external evidence may be resorted to in aid of construction. I do not refer to any evidence save that of surrounding circumstances that must be assumed to have been within the knowledge of the testatrix when she sat down to write out and execute this document. She knew that she had only a power of appointment over Rebecca's property, and she must be credited with the further knowledge of what that property consisted. Portion of it was Rebecca's one-fourth of the house and lands of Tramore,—which one-fourth, if the contention of the Flemings be right, would pass to them, yet it is plain from the very words of the will that the testatrix believed she had made her nephew, the defendant, T. S. Reeves, devisee of the whole of this house and lands. She expresses the hope that he will find it for his advantage to live in Tramore House,—a hope that could scarcely be realized if he was only getting three-fourths. With the help of this evidence no doubt exists in my mind that on the true construction of the will the Flemings are not appointees of Rebecca's residue, and that a blunder has occurred by the omission to name the beneficiary.

It is scarcely necessary to again call attention to the fact that under no circumstances could Mrs. Fleming's children take any portion of Rebecca's property.

The other question is attended with much more difficulty. Is the will of 1905 to stand alone, or is the will of 1903, or any portion of it, to be still regarded as unrevoked, and therefore entitled to admission to probate as constituting part of the will of the testatrix? If the 1905 will stands alone, then the residue of Rebecca's property will, having regard to the construction I have placed on the language of the will, go as in default of appointment. On the other hand, if the will of 1903 or that part of it which appoints the residue is unrevoked, Thomas S. Reeves would be the beneficiary. The authorities on the subject of revocation of one testamentary document by another of later date are very numerous. They all recognize the governing principle to be

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accurately stated in Williams on Executors (6th ed., p. 156; 9th ed., p. 138) as follows:—"The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that 'no man can die with two testaments,' yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary) may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper, whether in form a will or a codicil, be partially inconsistent with one of earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent." See *Lemage* v. *Goodban* (1); *Cadell* v. *Wilcocks* (3); *Kent* v. *Kent* (4); *Leslie* v. *Leslie* (2). Therefore the question, where there are two testamentary dispositions, is, does that one which is later in date expressly or impliedly revoke the prior one, or are the two incapable of standing together? It may be answered by a consideration of the language of the two documents or, if there be a doubt as to whether the later will was intended to be a complete substitution for the prior one, or only an addition to it in whole or in part, external evidence to ascertain the intention of the testator may be resorted to—external evidence not, as I interpret the cases, for the purpose of filling blanks or supplying deficiencies, but merely as to the intention to substitute or supplement, to revoke or to retain, the dispositions in the earlier will: *Methuen* v. *Methuen* (5); *Jenner* v. *Ffinch* (6); *Townsend* v. *Moore* (7); *Estate of Bryan* (8). I think that there is sufficient doubt on the will of 1905 to let in extrinsic evidence. *Methuen* v. *Methuen* (5), *Thorne* v. *Rooke* (9), *Estate of Bryan* (8), all recognize that the same rules of evidence do not apply in a case relating to the factum of a will which would apply if the inquiry were concerning the construction of it. Sir John Nicholl in *Methuen* v.

(1) L. R. 1 P. & D. 57, 62.
(2) I. R. 6 Eq. 332, 334.
(3) [1898] P. 21.
(4) [1902] P. 110.
(5) 2 Phill. 416.
(6) L. R. 5 P. D. 106.
(7) [1905] P. 66.
(8) [1907] P. 125.
(9) 2 Curt. 799.

Methuen (1) says (at p. 426): "In the Court of Probate the whole question is one of intention. The *animus testandi* and the *animus revocandi* are completely open to investigation in this Court." But, while I think the case is one in which parol evidence is admissible, it seems to me that the parol evidence that has been offered, so far as it deals with statements alleged to have been made by the testatrix as to her intentions in regard to the defendant, T. S. Reeves, is inadmissible. The memorandum found in her papers tied up with her wills is subject to the same observation. In point of date it goes no further than the 26th August, and the will was not executed until the 28th. But the circumstance which I have already referred to and which is the subject of external evidence, namely, that one-fourth of the house and lands of Tramore was included in Rebecca's property, and could not pass as portion of that belonging to the testatrix, is, in my opinion, admissible.

Before instituting a comparison between the two documents I shall state some general rules which I think have been established by authority in cases analogous to the present. In the first place, the use of the words, "this is my last will," is by no means conclusive on the subject of revocation. Indeed, in *Leslie* v. *Leslie* (2), the late Judge Warren regarded them as not entitled to any weight whatever. The later cases seem to treat them as deserving of consideration, but not as amounting to an expression of revocation: *Cutto* v. *Gilbert* (3); *Stoddart* v. *Grant* (4); *Townsend* v. *Moore* (5).

In the next place, the guiding intention is—not a substitution of one paper for another, but of disposition for disposition. In *Townsend* v. *Moore* (5), at p. 77, Vaughan Williams, L.J., says that *prima facie* every document purporting to be testamentary and executed in accordance with the Wills Act ought to be admitted to probate, but that that presumption of admissibility may be displaced by establishing a case of revocation. Furthermore, if there be clear words of gift in an earlier will, that disposition ought not to be regarded as revoked, unless by equally clear language; and the onus of showing

(1) 2 Phill. 416.
(2) I. R. 6 Eq. 332.
(3) 9 Moo. P. C. 131.
(4) 1 Macq. 163.
(5) [1905] P. 66.

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revocation rests on the party alleging it. On the other hand, if the two documents cannot possibly stand together, though there be no words of revocation—if the later will be complete and exhaustive, and in effect disposes of all the property comprised in the prior will—if on the whole scheme and tenor of the later document it can be gathered that it was meant to supersede and displace the earlier will, then the former alone can be treated as entitled to admission to probate.

Now, reading the two wills, can I gather an intention on the part of the testatrix to annul the earlier will by that of 1905? If I am satisfied she intended to substitute the one for the other, then the residue of Rebecca's property will go in default of appointment, notwithstanding clear evidence of an intention to deal with it in some way. If the property were her own, the Court ought to observe what Lord Esher in *Turner* v. *Hellard* (1) calls the golden rule, and struggle against an intestacy. In my opinion, I am justified in applying the same principle to such a failure to appoint as has taken place in the present case. I think, however, having regard to the authorities, I must discriminate between intention to substitute one set of dispositions for another—effectually carried out and completed so far as regards form—and an intention to substitute which is incompletely carried out to the extent of being nugatory in the case of one particular disposition. If the only test were a naked intention to substitute one document for another and one set of dispositions for another, I would, without hesitation conclude that such was the intention in the present case. I view the whole scheme and design of the will of 1905, and I find evidence throughout that the testatrix meant to effect great changes in the disposal of the property mentioned in the will of 1903. So far also as form is concerned, the two documents are very dissimilar. In the will of 1903 the power of appointment in Rebecca's will is properly recited, whereas in that of 1905 the objects of the power are incorrectly stated. Then the aggregate of the sums appointed by the will of 1905 is considerably larger than that of the money appointments in the will of 1903. They amount to £245 in the one, and £430 in the other, in addition in

(1) 30 Ch. D. 390.

each case to the gifts of £5 each to Mrs. Fleming's daughters. The effect, of course, is that the residue in each will is different. In the will of 1903 there is a direct reference to the property and will of her deceased sister, Henrietta, while in that of 1905 there is none whatever. Rockboro', which in the will of 1903 was given to her deceased brother, Isaac, presumably as a trustee for his daughter, Elsie, is now given absolutely to Isaac's widow, to the entire exclusion of Elsie. Finally, the language used in the appointments and bequests differs widely in some cases from that used in the will of 1903, thus showing that though the testatrix had the will of 1903 in her possession, and not improbably before her, when she wrote out the will of 1905, she did not slavishly follow its terms. It will even be observed that she has deliberately inverted the names of Patty and Elsie Reeves as legatees of her necklace and ring. She has also, in setting out the particulars of Rebecca's residue, departed from the language of the will of 1903 by using the words "consisting of" in place of "including," and by the addition of the words, "with all the reclamations, buildings, and improvements to make it profitable, as it now is." All these circumstances satisfy me that when the testatrix approached the writing out of the will of 1905, she meant to supersede the will of 1903; and I entertain no doubt that when she executed it she considered that the latter was displaced. But is that enough in a case where the execution of the intention falls short of complete accomplishment? Suppose there was no reference to the residue at all, could it be said that a clear intention to supersede one document by another determined the continuance or retention of the disposition of the residue in the prior will? In my opinion the authorities are opposed to such a view.

In *Lemage* v. *Goodban* (1), a case in many respects not unlike the present, there were two holograph testamentary documents, the latter of which was only partly inconsistent with the earlier. Each professed to be the last will, and there was no clause of revocation in either. In the earlier will a curiously framed clause appointed the testator's sister residuary legatee. In the later document a somewhat similarly worded clause was inserted, but it

(1) L. R. 1 P. & D. 57.

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failed to indicate in terms who was to take the residue. Sir J. P. Wilde, in granting probate of both wills, after referring to the necessity of the Court being satisfied that the testator intended them to operate together, says (at p. 62): "In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered relates to the disposition of the testator's property and not to the form of his will . . . And so this Court has been in the habit of admitting to probate such, and so many, papers (all properly executed) as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering, not what papers have been superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or retain." In that case there were, in my opinion, as strong reasons as exist in the present for arriving at the conclusion that the testatrix intended to displace the earlier will, and to substitute for it the later document, yet the Court thought it would not be reasonable under the circumstances to conclude that the testator intended to revoke the residuary bequest in the first paper, and accordingly gave probate of both, as effect could only be given to the earlier disposition by so doing. *Birks* v. *Birks* (1) is an illustration of a case where there were blunders made in copying, and though the intention to substitute one paper for the other was manifest, both were admitted—on the ground apparently that there was a clear intention to revoke, ineffectually carried out. In *Leslie* v. *Leslie* (2) Judge Warren relies on the two authorities I have just referred to. In that case the later will repeated some of the dispositions in the earlier paper, and altered and omitted others, and made some additions, and finally made no appointment of executors or of a residuary legatee. Both were named in the earlier document. The Judge says (at p. 336):— "There may be grounds for conjecture that the deceased did, by his last will of 1870, intend to supersede all other wills, and did expect that that last will alone would be admitted to probate; but I decline to act on such conjecture without some more per-

(1) 34 L. J., Prob. 90. (2) I. R. 6 Eq. 332.

suasive evidence that Colonel Leslie intended to die intestate as to his residuary estate and personalty, of which he had fully disposed by the will of 1867, and that he intended to have no executors, though he had appointed executors in the will of 1867, and assumed the existence of executors in the will of 1870." The cases of *Goods of O'Connor* (1) and *Re Lloyd* (2) are to much the same effect; and so is *Cadell* v. *Wilcocks* (3), though somewhat more significant, having regard to the circumstance that, like the present case, it dealt with the execution of a power. The last case I need refer to is *Townsend* v. *Moore* (4) (in the Court of Appeal), which recognizes the authority of *Lemage* v. *Goodban* (5), and where Vaughan-Williams, L.J., lays it down (at p. 83) that "if, on any reasonable construction, the two documents can stand together, it is the duty of the Court of Probate to admit both documents to probate." In that case there were two codicils executed on the same date, which were largely inconsistent with each other, particularly in the gift of the residue, but in some respects identical. There were no words of revocation; but, in my opinion, it might well be that one was intended to supersede the other. Yet, the same Lord Justice says (at p. 82):—"In my opinion, if there had been two documents of prior and subsequent dates, which had contained these same two residuary clauses, it would not have been a proper inference to draw that the testatrix intended by the one to revoke the other." He adds, that the real question is, whether the two documents can be read in such a way as that they can stand together. Applying the principle of these cases, the two papers of 1903 and 1905 can, in my opinion, stand together, and I shall decree probate of both.

The cases of *Henfrey* v. *Henfrey* (6), *Pepper* v. *Pepper* (7), *Shiel* v. *O'Brien* (8), and *Goods of M'Farlane* (9), can be distinguished, on the grounds that the later document contained a complete and exhaustive disposition of the property, and the two papers could not stand together; while, in *Dempsey* v. *Lawson* (10),

(1) 13 L. R. Ir. 406.
(2) I. R. 6 Eq. 348.
(3) [1898] P. 21.
(4) [1905] P. 66.
(5) L. R. 1 P. & D. 57.
(6) 4 Moo. P. C. 29.
(7) I. R. 5 Eq. 86.
(8) I. R. 7 Eq. 64.
(9) 13 L. R. Ir. 264.
(10) L. R. 2 P. D. 98.

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Jenner v. *Ffinch* (1), and *Estate of Bryan* (2), the Court came to the conclusion, on the general tenor of the later document, and also on the oral evidence, that the later document was clearly intended as the sole will, and consequently that it revoked the earlier.

I have considered whether I should include the whole of the will of 1903, or only those parts which, in my opinion, are unrevoked, namely, the appointment of executors and the appointment of the residue of Rebecca's property (see *Re Kehoe* (3)), and I have come to the conclusion it is more advisable to admit the whole. The question of admitting only a part was not argued, or even referred to.

Both parties will have their costs out of the estate.

Solicitors for the plaintiffs: *T. Babington & Son.*
Solicitor for the defendants: *H. F. Martley.*

W. L.

K. B. Div. 1909. May 11, 12. *Appeal.* June 8, 9, 10, 30.

THE KING (AT THE PROSECUTION OF THE MARQUESS OF CLANRICARDE) *v.* THE ESTATES COMMISSIONERS (4).

Compulsory purchase—Evicted Tenants (Ireland) Acts, 1907, 1908—Offer—Objections—Petition against acquisition without further inquiry—Tenanted land—Consent—Estates Commissioners—Excess of jurisdiction—Prohibition—Waiver.

The Estates Commissioners published in the *Dublin Gazette* notices under the Evicted Tenants (Ireland) Act, 1907 (7 Edw. 7, c. 56), s. 2, sub-s. 1, for the compulsory acquisition of lands of which C. was owner. Two of these stated that in so far as the lands were tenanted, the tenants had signed consents, filed as a record under the Evicted Tenants (Ireland) Act, 1908 (8 Edw. 7, c. 22), s. 1. They were in other respects in the form in the schedule to the Provisional Rules of the 24th October, 1907 (5). No previous

(1) L. R. 5 P. D. 106. (2) [1907] Prob. 125. (3) 7 L. R. Ir. 343.

(4) In the King's Bench Division, before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

(5) These Rules will be found in the *Dublin Gazette*, Oct. 25, 1907, p. 1462.

offer to purchase the lands had been made. C. lodged objections to the acquisition of the lands on the grounds, *inter alia*, that the consents obtained from tenants were invalid, and reserving the right to make all legal objections by petition (1). The Commissioners subsequently made offers to purchase the lands in two divisions, one for £17,187, and the other for £11,180, each offer reciting that no objection appearing to the Commissioners to be valid had been raised to such acquisition. Thereupon C. presented a petition in respect of each offer, in which he prayed that the lands might not be acquired compulsorily without further inquiry. In the petition he relied on the objections lodged, and further alleged that the conditions precedent to the compulsory acquisition of the lands had not been complied with. The petitions having come on for hearing before the Commissioners, C. appeared by counsel. It appeared that a large portion of the lands to which each offer related were in the occupation of tenants answering the description in the proviso in subsection 3 of section 1 of the Act of 1907, and, in the opinion of the Court, the documents alleged to be consents were not consents within the meaning of the Act of 1908. Counsel for C. objected to the Commissioners proceeding further, on the ground, *inter alia*, that, under the circumstances, the Commissioners had no jurisdiction to acquire the lands compulsorily. The Commissioners announced their intention of submitting certain questions of law for the determination of the Judicial Commissioner. C.'s counsel declined to take any part in the settlement of such questions; and before any questions were settled or submitted to the Judicial Commissioner, and before the Estates Commissioners had determined any questions arising on the petitions, C. obtained, on the 26th February, 1909, conditional orders for writs of prohibition, prohibiting the Commissioners from taking further proceedings for the compulsory acquisition of the lands. These orders were amended on the 4th May, 1909.

On motion to make the conditional orders absolute:—

Held, by the King's Bench Division (Palles, C.B., and Andrews, J.; *diss.* Johnson, J.) and by the Court of Appeal, that C. was entitled to have the orders made absolute, on the grounds—

Per Palles, C.B. (with whom Andrews, J., concurred), that the Commissioners, without evidence sufficient to prove that the lands comprised in their offers to purchase were lands which they had jurisdiction to purchase, overruled C.'s objection which insisted on that absence of jurisdiction, and that C. had not waived his right to prohibition by presenting his petitions or otherwise.

Held, by Johnson, J. (who on other points concurred in the judgment of Palles, C.B.), that C. had lost his right to prohibition by presenting the petitions.

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(1) See full copy of objections in the judgment of the Lord Chancellor, *infra*, p. 562.

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Held, by the Court of Appeal, that once it appeared by evidence on the hearing of the petitions, that the lands in each offer were partly tenanted by persons coming within the proviso in section 1 (3) of the Act of 1907, from whom valid consents had not been obtained under the Act of 1908, and the Commissioners, notwithstanding, persisted in continuing the proceedings, C. was entitled to prohibition.

Held, by the Lord Chancellor (*diss.* FitzGibbon, L.J., and *dub.* Holmes, L.J.), that the decision of the majority of the King's Bench Division in *The King* (*Hinds*) v. *Estates Commissioners* (*ante*, p. 258) was right; but *held*, by the Lord Chancellor and Holmes, L.J. (*diss.* FitzGibbon, L.J.), that C. had waived the necessity (if such existed) of an independent offer under sect. 1 (1) as a condition precedent to compulsory acquisition.

Held, by Lords Justices FitzGibbon and Holmes (*diss.* the Lord Chancellor), that the Commissioners, in deciding, under sect. 2 (4) of the Act of 1907, on the validity of objections lodged, are acting judicially; and (following *In re Hind's Estate*, 43 L. T. R. 75) their decision is appealable, or if they overrule such objections without notice to the objector, or hearing any evidence offered in support of the objections, prohibition may issue.

MOTION on behalf of the Marquess of Clanricarde, to make absolute two conditional orders, dated 26th February, 1909, that writs of prohibition should issue, directed to the Estates Commissioners, prohibiting them from taking further proceedings for the compulsory acquisition of the lands set out in the schedules to two offers of the Estates Commissioners, dated the 22nd December, 1908, in one of which £17,187, and in the other £11,180, were offered for the purchase of the lands respectively comprised therein, and each entitled "Irish Land Commission. Estates Commissioners. Offer under section 2 (4) of the Evicted Tenants (Ireland) Act, 1907. In the matter of the estate of the Most Noble the Marquess of Clanricarde, the supposed owner of land." These orders were amended on the 4th May, 1909.

The facts of the cases, which are briefly outlined in the head-note, are fully stated in the judgments of the Lord Chancellor and Holmes, L.J., *infra*, pp. 561, 582, the grounds of the conditional orders as amended being set out *infra*, pp. 564, 565.

The Right Hon. J. H. Campbell, K.C., H. D. Conner, K.C., and *J. W. Hynes*, for the Marquess of Clanricarde.

Ronan, K.C., Jellett, K.C., and *De Renzy*, for the Estates Commissioners.

PALLES, C. B. :—

As we understand from the statement made by Mr. Ronan, upon the day when we fixed the date for the argument of this motion, that the proceedings of the Estates Commissioners are being delayed in other cases, awaiting the decision of this Court upon the questions which were argued yesterday and to-day, we think it right that our decision should be given at once.

I am of opinion that the writ of prohibition asked for in each case ought to issue.

In arriving, however, at this conclusion, I do not express any opinion upon many of the arguments which have been addressed to us by the learned counsel who have moved for the writ. I base my judgment upon one single ground, viz., that the Estates Commissioners, without evidence sufficient to prove that the lands comprised in their offers to purchase are lands which they have jurisdiction to acquire compulsorily, overruled the objection of Lord Clanricarde, which insisted upon that absence of jurisdiction.

The 1st section of the Evicted Tenants Act, 1907, enacts that if it appears to the Estates Commissioners that it is expedient to acquire any land for the purposes of the Act, and if they have offered to the person appearing to them to be the owner of the land to pay a price which appears to them to represent the value thereof, and he has not within the prescribed time accepted the offer, they may, subject to the provisions as to appeal contained in the Act, acquire that land compulsorily for those purposes, in accordance with the provisions of the Act.

I pass over all the arguments which have been addressed to us in reference to the purposes of the Act. In the view which I take of the case those questions do not arise; and I come at once to the 3rd sub-section, which provides that "no tenanted land shall be acquired compulsorily which is in the possession or occupation of a *bona fide* tenant, using or cultivating the same as an ordinary farmer, in accordance with proper methods of husbandry."

It is quite clear that, taking this section as it stood in the original Act, there was an absence of jurisdiction in the Commissioners to acquire land compulsorily, which fell within the description of "tenanted land" in this proviso. Last year, however, an amending Act of Parliament was passed (8 Edw. 7,

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c. 22), which enacted "That the proviso at the end of sub-sect. 3 of section 1 of the Evicted Tenants Act, 1907, shall not apply in any case where the tenant consents in writing to the compulsory acquisition of the land by the Estates Commissioners." Then follows this proviso: "Provided that the tenant shall sign such consent in the presence of two witnesses, present at the same time, who shall attach their names thereto; and when so signed and witnessed, that the said consent shall be filed as a record in the office of the Land Commission."

These two enactments taken together show that the Estates Commissioners have no jurisdiction to acquire tenanted land which is in the possession or occupation of a *bona fide* tenant, using or cultivating the same as an ordinary farmer, in accordance with proper methods of husbandry, unless the tenant has, by a document in writing, filed as a record in the office of the Land Commission, consented to the compulsory acquisition of the land by the Estates Commissioners.

Those are the material enactments bearing on the present case.

Assuming, as I do, but without expressing any opinion of my own upon the question, that the decision of the majority of the Court in *The King* (*Hinds*) v. *Estates Commissioners* (1) is correct, the first step in the procedure which the Estates Commissioners are, by the Act, directed to adopt for the purpose of acquiring lands compulsorily, is to publish a notice to that effect in the *Dublin Gazette*, calling upon any persons interested who may object to the acquisition of the land under the Act to lodge in the office of the Land Commission, within the prescribed period, a statement of the grounds of their objection. They accordingly did publish that notice in reference to the lands in question here; and Lord Clanricarde, who was a person interested in the lands, objected to their compulsory acquisition, and lodged in the office of the Land Commission a statement of the grounds of his objection. Amongst the many grounds of objection contained in that statement, Lord Clanricarde insisted that the lands were tenanted lands, and in the possession or occupation of *bona fide* tenants,

(1) [1909] 2 I. R. 258.

using or cultivating the same as ordinary farmers, in accordance with proper methods of husbandry.

The duty of the Commissioners when objections are filed is prescribed by the 4th sub-section of section 2 of the Act:—"If it appears to the Estates Commissioners, after considering the report of their inspectors, and any objections to the acquisition of the land lodged as aforesaid, that the land is suitable for the purposes of this Act, and that *no valid objection* has been raised to such acquisition, they may, if they think fit, make an offer to the person, appearing to them to be the owner of the land, for the purchase thereof at such price as appears to them *prima facie* to be a reasonable price."

This offer, unless some step be taken by the persons interested, may result in the Estates Commissioners making an order vesting the land in the Land Commission. The 6th sub-section directs this course to be adopted by the Estates Commissioners if no petition has been presented to the Land Commission praying that the lands shall not be so acquired without further inquiry. If, on the other hand, such a petition is presented, all questions arising thereon shall be determined by the Estates Commissioners, subject to the right of an interested party to require the decision of the Judicial Commissioner on questions of law, and, subject to the determination of all questions arising on the petition, an order vesting the land in the Land Commission may be made.

It seems clear to me that, as the Estates Commissioners are a tribunal of inferior jurisdiction, no intendment can be made in favour of their jurisdiction; and that when an objection to that jurisdiction is made, as it was by Lord Clanricarde, it is impossible that they should legally overrule that objection without judicially determining, upon sufficient evidence, upon an inquiry, held after notice to him, and after giving him an opportunity of attending, either (1) that the lands were not in the possession of *bona fide* tenants, or (2) that the tenants were not using or cultivating the same as ordinary farmers, in accordance with proper methods of husbandry, or (3) that the tenants had, by written and recorded documents, consented to the Estates Commissioners compulsorily acquiring their holdings. To entitle them to proceed these matters should have been affirmatively proved; and in the absence of such

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affirmative proof it was not incumbent upon Lord Clanricarde to disprove them. This judicial duty, however, being thrown upon the Estates Commissioners, they proceeded to determine Lord Clanricarde's objection, which depended entirely upon matters of fact, without hearing any evidence, in the absence of Lord Clanricarde, and without giving him an opportunity of being heard. Thus, although on the face of their proceedings it appears that he objected to their jurisdiction, they proceeded to determine, without evidence, that they had jurisdiction; and having thus illegally decided that they had jurisdiction, they continued their course of procedure to compulsorily divest Lord Clanricarde of his estate in these lands.

Now, I need not say that, unless there is something very special in the Act of 1907, such a course of procedure is illegal, and must, when the attention of this Court is called to it, be restrained by prohibition. It ought not to be necessary now, after the lapse of upwards of half a century, to quote the fundamental and, indeed, elementary rule happily expressed in the judgment of the Exchequer Chamber in *Bunbury* v. *Fuller* (1):—"Now, it is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up that subject-matter, which, if true, is within its jurisdiction, and however necessary it may be in many cases for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the Superior Court. . . . Its decision must be open to question; and if it improperly either forbore or proceeded on the main matter in consequence of an error on this, the Court of Queen's Bench will issue its mandamus or prohibition to correct its mistake."

In the present case, whether the land was or was not tenanted, whether it was cultivated in the mode mentioned in the Act, and whether, if so, the tenant had consented in the manner prescribed by the Act of 1908, were all points collateral to the merits of the

(1) 9 Exch. 140.

case, the points upon which the limits of the jurisdiction of the jurisdiction of the Estates Commissioners depended; and although the Estates Commissioners would have had jurisdiction to make a preliminary inquiry as to those matters, their decision upon those preliminary questions, even had there been evidence to support them, would have been open to inquiry and review here; and as the Estates Commissioners improperly proceeded on the main matter, *i.e.*, the question of the merits, in consequence of their erroneous decision upon those preliminary questions, the above case is an express authority that this Court will issue its prohibition to correct the mistake. This, indeed, is no more than a corollary to the judgment of Holmes, L.J., in *Hinds' Case* (1), in which the learned Lord Justice held that a decision of the Estates Commissioners, under section 2, sub-section 4, such as the present, overruling an objection, was a judicial decision, from which an appeal lay. The decision of the Court of Appeal in *The King* (*Mowbray and Stourton*) v. *Local Government Board* (2) is *a multo fortiori*. There each member of the Court of Appeal was of opinion, and I think expressed it, that a rule under which the solicitor of the vendor, whose costs were under taxation, would not have an opportunity of being heard, was illegal and void. With how much greater force does that principle apply to a purchase by the Estates Commissioners of lands, in one case for upwards of £17,000, and in the other for upwards of £11,000.

I cannot entertain any doubt that, if Lord Clanricarde's advisers had rested here, and, without presenting a petition to the Estates Commissioners, had at once moved for a prohibition, the case would have been absolutely unarguable. It did not, however, rest there; and I must, therefore, proceed a little further. The Act of Parliament, contemplating, of course, a legal judicial decision that the lands were within the jurisdiction of the Estates Commissioners, proceeds, by sub-section 4 of section 2, to direct that the Estates Commissioners, if it appears to them that no valid objection has been made to the compulsory acquisition of the land, may make an offer to the person appearing to them to be the owner of the land; and it enacts that, after a certain notice

(1) 43 I. L. T. 75. (2) 43 Ir. L. T. R. 76.

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shall have been given, if a petition is not presented within a prescribed time to the Land Commission, praying that the land shall not be compulsorily acquired without further inquiry, the purchase-money of the land is to be paid into the Bank of Ireland, and an order is to be made vesting the land in the Land Commission. Accordingly, the Estates Commissioners, overstepping the limits of their jurisdiction, published a notice, stating that these lands would be acquired compulsorily, unless within a month a petition was presented, praying that they should not be so acquired without further inquiry. That notice having been given, Lord Clanricarde appears to have been advised that, instead of, or in addition to, applying for a writ of prohibition, he should present a petition to the Land Commission, praying that the lands might not be compulsorily acquired. This he accordingly did; and in the petition he relied upon all the objections previously raised, which, I have shown, went to the root of the jurisdiction of the Estates Commissioners.

The filing of this petition is the main argument upon which the counsel for the Estates Commissioners rely as an answer to the application for a prohibition. Whatever effect it may have in point of law, to which I shall come later on, the proceedings under this petition have the result of throwing considerable light upon the facts of the case.

The 9th paragraph of the affidavit of Mr. Davidson, filed in the case in which the amount of the offer was £11,180, is as follows: "It was proved by the said witness, and no evidence was given to the contrary, that, with the exception of about 20 acres, or thereabouts, all the lands set out in the schedule to the said offer were tenanted lands, in the possession or occupation of *bona fide* tenants, using or cultivating the same as ordinary farmers, in accordance with the proper methods of husbandry. It was also proved that the said lands had been for many years in the occupation of such tenants."

In the 11th paragraph of his affidavit in the other case (*i.e.*, that in which the offer was £17,187) Mr. Davidson stated that it was proved on behalf of the petitioner, and not contradicted, that the lands comprised in twenty-two of the holdings comprised in the offer of the Commissioners were tenanted lands, which for

many years had been, and then were, in the possession or occupation of *bona fide* tenants, using or cultivating the same as ordinary farmers, in accordance with the proper methods of husbandry; and that documents were then produced on behalf of the applicants (by which is meant evicted tenants or their representatives), whereby new tenants of the lands purported to give up possession of their respective holdings to the Estates Commissioners in consideration of sums of money, and that the Estates Commissioners were not parties to these documents.

Lord Clanricarde's counsel, of course, insisted that these documents were not consents within the meaning of the Act of 1908, and that, by reason thereof, the Commissioners had no jurisdiction to proceed.

The affidavit of the assistant-secretary of the Estates Commissioners, filed as cause against the conditional order in the first case, states, in paragraph 4, that evidence in support of the allegation in paragraph 9 of the affidavit was produced upon the hearing of the said petition. And by his affidavit in the second case states that the evidence stated by Mr. Davidson was given, and that the objection mentioned by him was made. He does not allege that any evidence was given to the contrary. Thus, no dispute is raised as to the facts.

In this Court the documents alleged to be the consents were produced, not by the Estates Commissioners, but by some one who appeared for the persons in Mr. Davidson's affidavit called "the applicants," *i.e.*, the persons who desire to be reinstated as tenants. Those consents are not recorded, nor are they in any sense "consents" within the meaning of the Act of 1908. They are conditional on the payment of sums of money; and there is no agreement by the Estates Commissioners, or by any other person, to pay those sums, nor have the Estates Commissioners jurisdiction under the Act to pay or agree to pay them. I have no hesitation in holding that those documents are not "consents" within the meaning of the Act, so that the case does not rest, as it would have rested had Lord Clanricarde applied for this prohibition immediately after the publication of the notice, upon the ground of absence of evidence of jurisdiction. It is now not only affirmatively proved that there was no jurisdiction, but the

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answer given to that objection, viz., the production of the consents, admits the existence of the tenancies which oust the jurisdiction. I need not say that if any part of the lands is tenanted, as the offer is single and indivisible, the entire offer is bad as being outside the powers of the Commissioners.

Thus, only two questions appear to remain—First, the question of conduct. Has the conduct of the advisers of Lord Clanricarde been such as to deprive him of his right to a prohibition? Secondly, is there anything special in the Act which extinguishes or abridges the right which Lord Clanricarde *prima facie* has?

No doubt, under certain circumstances, the right to prohibition, although it is a writ of right, may be lost by conduct.

The underlying principle of this rule is the importance of making an end of litigation, and is laid down in the judgment of Willes, J., in *Mayor of London* v. *Cox* (1) (which was adopted by the House of Lords), in these words: "Where, however, the defect is not apparent, and depends upon some fact in the knowledge of the applicant, which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance; yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant."

I quote these words from the case, cited by Mr. Ronan, of *Broad* v. *Perkins* (2), as an authority that in the present case we should refuse the writ. I read them because their very terms show that they cannot have any application in the present case. The objection here was brought forward at the earliest possible moment, and was insisted upon at every stage of the proceedings. Indeed, the argument relied on reminds one of the pithy sentence of Platt, B., in *Jackson* v. *Beaumont* (3):—"Unless a constant protest against the jurisdiction of the Judge is to be construed as

(1) L. R. 2 H. L. 239, at p. 283. (2) 21 Q. B. D. 533. (3) 11 Exch. 303.

an acquiescence in his jurisdiction, there is no acquiescence here." Further, the present application has been made before judgment. The real objection to Lord Clanricarde's action here is that he has objected too often. He is told by this judicial body that if he does not present a petition within a month, his lands will be taken compulsorily; and is it in reason to say, because he obeys that direction, and lodges a petition, which reiterates his previous objections, and succeeds in proving that his grounds of objection to the jurisdiction are true, that he has thereby lost his right to this writ of prohibition? I cannot hold that. I believe that Lord Clanricarde was honest in trying to give the Estates Commissioners every information. From the first he insisted that their action was contrary to the Act of Parliament. He filed his petition because he was told that unless he did so an illegal act would be committed against him, by his estate being taken from him compulsorily. I cannot hold that, under those circumstances, he has lost his right to a writ of prohibition.

The only remaining question, then, is whether, on the true construction of the Act of Parliament, the writ of prohibition is taken away. I find that there are provisions in the Act which enable judicial authorities to decide, under the Act, whether there has or has not been an excess of jurisdiction. For instance, if the Estates Commissioners had decided the question raised by the petition, undoubtedly Lord Clanricarde might have insisted that the question of the absence of jurisdiction should be submitted, under the Act of 1903, to the Judicial Commissioner, and there might have been an appeal from his decision to the Court of Appeal. The same question might have been raised by an appeal to the Judge of Assize, or to a *rota* Judge. But, in my opinion, these enactments fall far short of indicating any intention to take away the writ of prohibition. They do no more than provide further safeguards for those whose lands are sought to be taken without jurisdiction. They afford a summary, but a cumulative, remedy, and do not touch the jurisdiction of the Court in prohibition—a jurisdiction which does not rest on individual damage to the suitor, but upon the encroachment upon the royal prerogative which results from the due order of the administration of justice having been departed from.

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In my opinion, the conditional orders in each of the two cases should be made absolute, and the Estates Commissioners should pay the costs. We shall, however, put a stay upon the issue of the writ or further proceedings for twenty-one days, to give the Estates Commissioners an opportunity to appeal; and if an appeal be brought within that time, the proceedings will be further stayed until the decision of the Court of Appeal shall have been pronounced.

ANDREWS, J., concurred.

JOHNSON, J.:—

I regret that I am unable to concur. I think Lord Clanricarde is too late in coming to this Court for a writ of prohibition. I offer no opinion as to whether prohibition is taken away by the statute or not; but it seems to me that the Act was passed to enable the compulsory acquisition of land by a tribunal appointed for this special purpose, and that it provides for the determination by that tribunal of all matters, from beginning to end, necessary for such acquisition, subject to the provision of the Act of 1903 with respect to questions of law, and to the appeal given by section 2, sub-section 11, of this Act. Therefore, I think that the ordinary principles applicable to prohibiting an inferior Court from exceeding its jurisdiction ought to be carefully observed in the present instance.

Section 2 of the Act of 1907 enacts that when it is proposed that any land shall be compulsorily acquired under the Act, the Estates Commissioners shall first publish notice in the *Dublin Gazette*, calling on all persons interested in the land who may object to its acquisition to lodge a statement of the grounds of their objection in the office of the Land Commission. The Estates Commissioners published their notice in the *Gazette*, and, on the 12th November, 1908, long before the present proceedings in prohibition were instituted, Lord Clanricarde lodged his objection in the office of the Land Commission, raising every single question that has been discussed in argument here, the foundation of them all being that the lands proposed to be taken were not within the Act. Section 2 then goes on to provide (sub-section 4) that if it

appears to the Estates Commissioners, after considering the objections, that no valid objection has been raised, they may make an offer for the purchase of the land. It is only in the event of it appearing to them that no valid objection has been raised that they can proceed in the matter. In the present case a valid objection was raised in the opinion of Lord Clanricarde, and he then had an opportunity of applying to this Court to stay the proceedings of the Estates Commissioners; but instead of doing so, he deliberately adopted, as he was entitled to do, the procedure pointed out by sub-section 5, and presented a petition to the Land Commission, praying that the lands should not be acquired without further inquiry; and in that petition he raised all the questions that have been argued here. The writ of prohibition is not granted *ex debito justitiæ*, and there is authority for the proposition that where a person elects to proceed before the inferior tribunal he waives his right to the writ.

Sub-section 7 provides that if a petition has been presented, and has not been withdrawn, "the petition and all questions arising thereon" (and in the present case, as I have said, every question argued here was raised by the petition) "shall, subject," as I have said, "to the provisions of section 23 of the Act of 1903, with respect to questions of law, be heard and determined by the Estates Commissioners, or any two of them; and their decision shall, subject to the provisions of this section, be final." It does not make their decision absolutely final. A right of appeal is, as I have said, given by sub-section 11.

Lord Clanricarde, having deliberately selected this mode of proceeding by petition under the Act, and having embarked on the inquiry before the Estates Commissioners—before a reasonable opportunity for their decision is afforded to them on the questions arising on the petition—without even withdrawing his petition, and without waiting their decision, suddenly changes his mind, *pendente lite*, and applies to this Court to stay the proceedings before the Estates Commissioners, whose jurisdiction he himself had invoked and accepted. The inferior Court has not acted, or proposed to act, unlawfully, or without or beyond its jurisdiction. The Estates Commissioners have, it seems to me, so far, throughout acted as directed by the Legislature; and without,

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so far as I can see, any valid reason, Lord Clanricarde summarily applies to this Court for the prerogative writ of prohibition, to stop their proceeding, which he has himself regularly invoked by petition still pending. I think he is too late for this; and for this reason, and this reason only, I am unable to concur in the decision of the Court.

J. G. T.

Appeal. June 8, 9, 10, 30.

The Estates Commissioners appealed (1).

Ronan, K.C. (with him *Jellett, K.C.*, and *De Renzy*), for the appellants :—

The question whether there should be two offers before compulsory acquisition was treated in the King's Bench Division as concluded by *The King* (*Hinds*) v. *Estates Commissioners* (2); but it is open upon appeal. The decision of the Court below in the present case proceeded on the ground that, as held by Lord Justice Holmes, on circuit, in *In re Hinds* (3), the Commissioners, when acting under section 2 (4) of the Act of 1907, are acting judicially; and that, as they decided that no valid objection had been raised, without notice to the Marquess of Clanricarde, or hearing him if he chose to appear before them, they were acting without jurisdiction, and all subsequent proceedings were void. But the Act provides (section 2, sub-section 7) that persons who object to the acquisition are to present a petition, and all questions arising thereon, except questions of law, shall be heard and determined by the Estates Commissioners, and their decision, subject to being reviewed as mentioned in the section, is final. Here Lord Clanricarde had presented a petition, and the Commissioners were proceeding to hear and determine the questions arising on it when they are prohibited. The statute says, "The Commissioners shall hear and determine"; the King's Bench Division says, "No, they shall not do so." Section 1 of the Act of 1907 confers on the Commissioners a general power of compulsory purchase, where

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES FITZGIBBON and HOLMES.

(2) *Ante*, p. 258.

(3) 43 Ir. L. T. R. 75.

they offer to the person, appearing to be the owner, a price which appears to them to be the value thereof, subject to certain exceptions, namely, tenanted land, in the proviso to section 1 (3), unless by consent, as provided by the Act of 1908, and the untenanted lands described in section 7 of the Act of 1907, demesne, &c. The machinery for working out the powers given by section 1 of the Act of 1907 are all contained in section 2 of that Act.

Where it is proposed that land shall be acquired "compulsorily" certain proceedings are to be taken. There is, first, the *Gazette* notice, then the estimation of the price by inspection, and, thirdly, the offer of what appears to them *prima facie* to be a reasonable price, under sub-section 4. The offer here is alleged to be bad, on the ground that a previous offer, under section 1 (1), was not made. But the King's Bench in the present case have held that there was no jurisdiction to make the offer at all. We contend that the view taken by the majority of the King's Bench in *The King* (*Hinds*) v. *The Estates Commissioners* (1) was absolutely right. It is quite plain that the words "appears" and "appearing" in section 1 (1) exclude the idea of a judicial investigation; and the same must be held where they occur in section 2 (4). The effect of the offer is stated in sub-section 6. In *The King* (*Hinds*) v. *The Estates Commissioners* (1) Wright, J., states the question thus:—"Is the land taken compulsorily where, after notice in the *Gazette*, an offer is made to the owner, and is accepted? Or, does the acquisition become compulsory only after such offer has been refused, such refusal being evidenced by the presentation of a petition against the acquisition of the land?" And he held that the proceedings do not become compulsory until there is a difference between the will of the vendor and the Estates Commissioners. There is no evidence at all that the Commissioners held the objections invalid, under section 2, sub-section 4, without evidence. The broad ground of the decision of the Lord Chief Baron is that the Commissioners overstepped their jurisdiction in making the offer, because it could not appear to them that there was no valid objection, until by holding an inquiry, on notice to Lord Clanricarde, they judicially determined that the lands came within the Act.

(1) *Ante*, pp. 258, 261.

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Even if this be so, Lord Clanricarde must be held to have waived this preliminary determination when he presented his petition, relying on these objections, raising further objections, appearing by counsel, and giving evidence before the Commissioners; and while they are proceeding to consider the objections, and to determine their validity, or otherwise, they are stopped by prohibition—they are stopped even from deciding that they had no jurisdiction to acquire the lands, though they are the tribunal appointed by statute to determine that question. In section 2, sub-section 11, the "determination" must be determination upon the petition.

As to the principles on which prohibition will be granted: Shortt & Mellor, Crown Practice (ed. 1908), p. 264:—"As a general rule a prohibition will only be granted where the want or excess of jurisdiction is apparent on the face of the proceedings, and certainly not where the inferior Court has jurisdiction over the subject-matter, and there is an appeal"; and (p. 256): "Prohibition deals with jurisdiction, and questions which are proper subjects of appeal cannot be dealt with in prohibition. In fact, where an appeal lies prohibition does not, unless 'something' has been done 'contrary to the laws of the land,' or 'so serious as to violate some fundamental principle of justice'": citing the judgment of Lord Justice Thesiger in *Martin* v. *Mackonochie* (1), adopted by Lord Cairns in the House of Lords (6 App. Cas. 440); *In re Irish Land Commission*; *Ex parte Johnston* (2).

Jellett, K.C.:—

There are three questions to be considered. First, that on which the decision of the Chief Baron proceeded; secondly, the question we came to argue; third, whether the decision in *The King* (*Hinds*) v. *The Estates Commissioners* (3) was right. First, the Chief Baron has held that making an offer under section 2, sub-section 4, is a judicial act of the Estates Commissioners. The only appeal given by section 2 is from a determination upon petition (sub-section 7), and from a determination upon a question arising under the provisions restricting the acquisition of

(1) 4 Q. B. D. 732. (2) 14 L. R. Ir. 80. (3) *Ante*, p. 258.

land (sub-section 11). It follows that, if the Chief Baron be right, a person whose objections did not, under sub-sect. 4, appear to be valid had an appeal; if the appeal were decided against him, he can present a petition, and have another appeal to the same tribunal. Surely, that is not a reasonable construction to give to the statute. The Estates Commissioners give no decision under sub-section 4. They merely intimate their *prima facie* opinion on the objections.

On the second question, see *In re Irish Land Commission*; *Ex parte Johnston* (1), the judgments of Palles, C.B., pp. 91, 92, and of Dowse, B., where he says (at p. 96)—"All I can say is, that whether the Sub-Commission acted rightly or wrongly in this case, the authority to hear and decide it has been vested in them by the Legislature; and that being so, this Court has no power to issue a writ of prohibition. And in *Mayor, &c., of London* v. *Cox* (2), Lord Cranworth says, "Where an inferior Court is proceeding in a cause which arises on a subject over which it has jurisdiction, no prohibition can be awarded till the party sued in the inferior Court sets up a defence raising an issue which the inferior Court is incompetent to try." If ever a section told a tribunal that they were to decide each and every question arising upon a petition, it is sub-section 7.

As to *The King* (*Hinds*) v. *Estates Commissioners* (3), section 1 contains the general scheme of the Act. Section 2 prescribes the machinery for carrying it out. The two offers are identical. Suppose the Commissioners make an offer under section 1 to a person who appears to be the owner, and he accepts it, they would be bound to sell without knowing anything about the lands. As they have published no *Gazette* notice, they cannot send an inspector to examine the lands. If the apparent owner refuses, a second offer must be made. "Value" and "price" are used interchangeably in the Land Acts—see Act of 1887, section 16, Act of 1896, section 33, Act of 1903, section 64: *Close's Estate* (4), *Salmon* v. *Dunscombe* (5).

(1) 14 L. R. Ir. 80.
(2) L. R. 2 H. L. 239, at p. 293.
(3) *Ante*, p. 258.
(4) [1905] 1 I. R. 371.
(5) 11 App. Cas. 627, at p. 634.

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The Right Hon. J. H. Campbell, K.C., Conner, K.C., and *Hynes*, for the Marquess of Clanricarde :—

Until the Act of 1907, the only statutory power to reinstate evicted tenants was section 2 of the Act of 1903. The compulsory powers conferred by the Act of 1907 do not come into operation until the endeavour to acquire the lands under the earlier part of section 1 (1) has been made unsuccessfully. Either party can withdraw under section 1 (1) up to acceptance, but in purchases under section 2 (4) there can be no withdrawal except, under sub-section 14, where the price is raised on appeal. Of course if the owner accepts under section 1, he must prove his title. It was reasonable to give the Commissioners an opportunity of purchasing by agreement for the purposes of the Act. The right to acquire land compulsorily arises under the last four lines of section 1 (1). If the Commissioners' contention is right, they cannot acquire tenanted lands except in certain defined cases, and they cannot acquire demesne land, home farms, or townparks at all. But if they buy voluntarily, there is nothing to prevent them from so acquiring lands of this description. According to the Commissioners' argument section 1 (1) might as well be left out of the Act.

That prohibition lies to the Land Commission was decided in *In re Irish Land Commission*; *Ex parte Johnston* (1). The right of appeal does not take away the right to prohibition where there is a judicial determination by an inferior Court contrary to natural justice. We declined to be a party to the settlement of any legal questions, because, on the evidence given at the hearing of the petition, it was obvious that the Commissioners had no jurisdiction to proceed. Presenting the petition was no waiver. If the petition was not presented, a vesting order might have been made. But we obtained the conditional order before any adjudication was made. We were neither premature nor too late.

Jellett, K.C., in reply :—

Section 2, sub-sect. 14, enables the Commissioners to withdraw before acceptance, whether the offer is made under section 1 (1) or

(1) 14 L. R. Ir. 80.

section 2 (4). The notice in the *Gazette* is analogous to the notice to treat under section 18 of the Lands Clauses Act, 1845. That was not necessarily an exercise of compulsory powers. It might be followed by a voluntary purchase: Browne and Allan, Law of Compensation (2nd ed.), p. 27, citing *Guest* v. *Poole and Bournemouth Railway Company* (1) and *In re Uxbridge and Rickmansworth Railway Company* (2). As to the determination of the validity of objections, see the difference between the language of sub-section 4 and sub-section 7 of section 2. Under sub-section 4, the Commissioners were not required to determine anything. Where persons interested are to be heard by the Commissioners, there is express provision to that effect: section 2 (7), section 4 (3). *In re Irish Land Commission*; *Ex parte Johnston* (3) is an absolute authority in favour of the Commissioners; see the concluding paragraph of the Lord Chief Baron's judgment at p. 92. Can there be any doubt that the Estates Commissioners were acting within their jurisdiction under section 2 (7)? The reason for the wording of the sub-section is that an appeal only lies from their decision upon petition.

June 30.

THE LORD CHANCELLOR:—

The question in this appeal is, whether Lord Clanricarde is entitled by writ of prohibition to restrain the Estates Commissioners from proceeding to acquire certain lands compulsorily under the Evicted Tenants Act of 1907. Two orders of prohibition have been made by the King's Bench Division. One of them relates to lands included in an offer of the Estates Commissioners to purchase for a sum of £17,187, and the other to an offer to purchase for a sum of £11,180.

The different steps in the proceedings actually taken are the following, so far as I can collect them from the documents of which I have been able to obtain copies:—

The Estates Commissioners published notices in the *Dublin Gazette* of 22nd September, 1908, 16th October, 1908, 6th November, 1908, and 13th November, 1908, of their intention to acquire certain lands compulsorily, mentioned in the schedules

(1) L. R. 6 C. P. 553. (2) 43 Ch. D. 536. (3) 14 L. R. Ir. 80.

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to the notices; and they gave notice that, in so far as the lands are tenanted lands, the respective tenants in possession or occupation have consented in writing to the compulsory acquisition of the land by the Estates Commissioners, and that such consents were filed as a record in the office of the Commissioner; and they gave the other notices reported by section 2, sub-sect. 1, of the Act.

The next step, and it is in the order in the Act, was, Lord Clanricarde sent in elaborate grounds of objection in each case, raising every point which the ingenuity of counsel could suggest, as an obstacle to compulsory acquisition; and, amongst other matters, challenging the validity of the consents referred to. They were as follows:—

1. That the lands are tenanted lands, and in the possession or occupation of a *bona fide* tenant, using or cultivating the same as an ordinary farmer, in accordance with proper methods of husbandry.

2. That the lands are tenanted lands, and are not in the occupation of a new tenant, to whom the Evicted Tenants (Ireland) Act, 1907, applies.

3. That the lands are tenanted lands, and that the tenants thereof are not tenants of holdings formerly occupied by evicted tenants within the meaning of the Evicted Tenants (Ireland) Act, 1907.

4. That the lands are tenanted lands, and that it is proposed that persons other than the evicted tenants thereof should be placed in possession of same as purchasers thereof.

5. That the circumstances of the case, holdings, and district render it inexpedient that evicted tenants should be placed in possession of said lands as purchasers thereof, or otherwise.

6. That the evicted tenants who have made applications to be reinstated in their holdings on said lands are not fit and proper persons to become purchasers under the Land Purchase Acts.

7. That said lands are tenanted lands, held under tenancies including other lands not within the powers of the Estates Commissioners to deal with.

8. That the Act does not empower the Estates Commissioners to acquire portion of a holding.

9. That the land is tenanted land, and comprises premises never portion of any holding at any time in the occupation of an evicted tenant within the meaning of the Act.

10. That the land has not been selected with due regard to the general situation and convenience of other property of the owner, so as not to diminish the value thereof.

11. That if the Estates Commissioners rely on the tenant having signed any consent to the compulsory acquisition of these lands, the owner avers that any such consent is a nullity, and has been obtained by misrepresentation, and that the Estates Commissioners have no power to make the payments promised to the tenant in consideration of his signing such consent.

12. The said lands are already the subject of proceedings for the compulsory acquisition of the same, and such proceedings are pending and undetermined.

13. The owner reserves the right to make all the legal objections which he may be advised when the proper time comes for filing a petition against the taking of the said lands without further inquiry.

The next steps in order of date are two offers, dated 22nd December, 1908, purporting to be under sect. 2, sub-sect. 4, of the Act—one of £17,187 in gross, and the other of £11,180 in gross; and each offer contains the recital, "and whereas no objection appearing to the Estates Commissioners to be valid has been raised to such acquisition"; and the offers conclude—"The Estates Commissioners propose to acquire the said lands at the said price, unless within one month from the date of the offer a petition is presented, praying the said lands shall not be so acquired without further inquiry."

Lord Clanricarde, on the 18th January, 1909, presented a petition in respect of each offer, in each of which he referred to the objections already lodged against the acquisition of the lands, and relied on same. In addition to those objections, he alleged that the conditions precedent to the compulsory acquisition of the said lands had not been complied with, that the price offered was inadequate, and that for the reasons given in the said objections, and in this petition, and other legal objections, the said lands could not be compulsorily acquired by the Estates Commissioners, under the Evicted Tenants (Ireland) Act, 1907; and he prayed that the said lands, or any part thereof, should not be so acquired without further inquiry.

These petitions having been lodged, the Estates Commissioners gave notice that the petition had been fixed for hearing before them for Tuesday, 16th February, when all persons interested are at liberty to attend, and evidence may be given on oath. The cases having come on for hearing on the 17th February, in

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the presence of counsel and solicitors for the parties, witnesses were examined on behalf of Lord Clanricarde, and cross-examined; and objections were made to the jurisdiction of the Estates Commissioners to proceed to take the lands, on the ground, amongst others, that the consents in the case of tenanted lands produced were not consents within the meaning of the Act. The Commissioners did not determine the questions arising in the cases, but they intimated their intention of referring the questions of law arising therein to the Judicial Commissioners. A draft of certain questions proposed to be submitted as regards one denomination was shown to us, but I do not understand that they were ever completed; and I think it would be unfair to both parties to treat them as questions definitely intended to be actually submitted.

Before anything further was done, Lord Clanricarde, on the 26th February, 1909, obtained in the King's Bench Division a conditional order for a writ of prohibition against proceeding further for the compulsory acquisition of the lands set out in the schedules annexed to the offer of £11,180 and £17,187, respectively. The ground including those in the amended conditional order of 4th May, 1909, are as regards the offer of £17,187:—

1. That the offer of £17,187 was made for all the lands comprised in the schedule thereto, and as said schedule comprised lands which were tenanted lands, not in the occupation of a new tenant, and which could not be compulsorily acquired by the Estates Commissioners, the said offer was bad.

2. That the Estates Commissioners purport to acquire compulsorily the lands mentioned in the *Dublin Gazette* of the 22nd September, 16th October, 6th November, and 13th November, 1908. The greater portion of the said lands are tenanted lands, in the occupation of new tenants, to whom the Evicted Tenants (Ireland) Act, 1907, applies, and the said new tenants are *bona fide* tenants, using and cultivating the said lands as ordinary farmers, in accordance with the proper methods of husbandry, and that no valid consent in writing to the compulsory acquisition of the said lands was given by the said new tenants.

3. That the said lands are tenanted lands, in the occupation of new tenants, and no proper applications were made by evicted tenants, in pursuance of section 1, sub-section 2 (a), of the said Act.

4. That the Estates Commissioners cannot compulsorily acquire a portion only of a holding.

5. That the Estates Commissioners did not, previous to the publication of the notices in the *Dublin Gazette*, make the offer mentioned in section 1, sub-section 1, of the Evicted Tenants (Ireland) Act, 1907.

And as regards the offer of £11,180 :—

1. That the lands mentioned in the schedule to the *Dublin Gazette* of the 3rd December, 1908, are tenanted lands in the occupation of new tenants, and that said new tenants are *bona fide* tenants, using or cultivating the same as ordinary farmers, in accordance with proper methods of husbandry.

2. That the said new tenants have not consented in writing to the compulsory acquisition of the said lands.

3. That the Estates Commissioners did not, previous to the publication of the notice in the *Dublin Gazette*, make the offer mentioned in section 1, sub-section 1, of the Evicted Tenants (Ireland) Act, 1907.

4. That the offer of £11,180 was made for all the lands comprised in the schedule thereto; and, as the said schedule comprised lands which the Estates Commissioners could not compulsorily acquire, the said offer was bad.

It will be seen that questions of importance arise on those proceedings:—One, the true construction of sect. 1, sub-sect. 1, of the Act of 1907. Another question is, whether the declaration of the Estates Commissioners under sect. 2, sub-sect. 4, that no valid objection has been raised to the acquisitions, is, on the true construction of the Act, a determination from which an appeal lies under sub-section 11? And, finally, whether a writ of prohibition could be brought to restrain the further proceedings of the Estates Commissioners, and if so, whether the right to bring it has been waived or lost?

It will be convenient to deal first with the net question arising on the construction of the Act, whether the Estates Commissioners before taking any step to acquire the lands compulsorily were bound, as a condition precedent to the exercise of their powers, to make to the person appearing to them to be the owner an offer of a price which appeared to them to represent the value thereof, and that this offer, which is said to be made imperative by section 1, sub-section 1, is another and different offer from that prescribed by section 2, sub-section 4.

This point is ruled in favour of the Estates Commissioners by the decision of the majority of the Judges of the King's Bench

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Division in the case of *The King* (*Hinds*) v. *Estates Commissioners*(1), in which there was an application for a writ of prohibition. The point, however, is open on this appeal, and it is expressly raised by the amending conditional order of the 4th May, 1909.

I am of opinion that the views expressed on this point by the Lord Chief Justice and Mr. Justice Wright in *Hinds' Case* (1) are correct, and that only one and the same offer is referred to in sections 1 and 2. The question in my judgment entirely depends on the construction of the 1st and 2nd sections taken together. Section 1, sub-section 1, seems to me to be a summary of what is stated in section 2, which sets out the machinery to be adopted. I see no distinction whatever between the words "the value thereof" and the words "reasonable price" in sub-section 4. The different stages mentioned in the 1st section are also, unless this be an exceptional one, those mentioned in sub-section 4. I need only refer to the words "subject to the provision as to appeal contained in this Act," and "in accordance with the provisions of this Act." I think both voluntary and compulsory sales are provided for and within the contemplation of section 2.

If the offer is one and the same, it will be made at a time and under conditions when the Estates Commissioners will have had materials before them to ascertain a price. If this is not the construction, the first offer will be mere guess-work and illusory. It serves no purpose for the landowner, and seems to me a dealing with State money by a public department which it is hard to suppose the Legislature intended.

On this part of the case I can really add nothing useful to the judgments of Mr. Justice Wright and the Lord Chief Justice. If the construction of the Act be what I think it is, I do not think the Estates Commissioners could alter it by any rule which they purport to make, and they certainly do not treat any such rule as binding them. I have had the advantage of reading the judgment of Lord Justice Holmes, and I infer, though he does not express a definite opinion on the point, that he leans to the view that section 1 contemplates an independent offer; but I quite concur with him that, even if this were so, Lord Clanricarde must

(1) *Ante*, p. 258.

be taken by the steps he took to waive any objection on this head, and cannot rely on it now in support of the writ of prohibition which should have been applied for at once. Lord Clanricarde's grounds of objection do not specifically refer to it, and it is the amended conditional order of the 4th May, 1909, which first raises it.

The second question which I have indicated involves the true construction of section 2 of the Act of 1907 as a whole; and I state my view of it with great diffidence, as I know it is different from that of my colleagues. I think it was intended by the 4th sub-section that the Estates Commissioners should have power to form their opinion on the materials provided by the preceding sub-sections whether there was any valid objection raised to the acquisition, but all subject to the objections that may be raised by a petition which plainly may raise, and in this case did raise, every objection to the acquisition of the land, whether based on want of jurisdiction or otherwise, and that the Estates Commissioners were the constituted tribunal to decide upon these questions, subject to the right of appeal provided by the 11th sub-section, the decision on which by the constituted appellate tribunal is to be final. The function of the Judicial Commissioner, and of the appellate tribunal under sub-section 11, are carefully prescribed, and I think this latter appeal is exclusively pointed to the decisions on the questions involved in the petition.

In the present case this procedure was pursued; all the questions of jurisdiction were raised by the petition, and were referred to and came before the Estates Commissioners. The words "if it appear" are familiar words in the Land Acts as pointing to a view of the Land Commission or Estates Commissioners.

If I am right, it follows that the petition of Lord Clanricarde, with all its questions, was rightly before the Estates Commissioners for consideration and disposal on the 17th February, and that up to that a writ of prohibition was out of place.

But then comes the question, whether having regard to what occurred at the hearing in February, it was in the power of Lord Clanricarde to apply for the conditional order which he obtained on the 26th February.

To test that question we must consider the nature of this

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prerogative writ, and what is proved to have taken place at the hearing in February.

I think it may be stated as a settled proposition of law that if an Inferior Court is shown to be acting without jurisdiction, or in excess of jurisdiction, a party to the proceeding is, before judgment given, entitled to have the proceedings restrained by prohibition, unless he has by misconduct or laches lost his right. This seems to me the result of the decision of the House of Lords in *The Mayor, &c., of London* v. *Cox* (1), and includes, I think, all the limitations of the right; but then what occurred on the hearing in February?

It is not disputed in the affidavit, and it was not contested in argument, that it was proved in evidence that the lands were occupied by tenants, and that the consents produced were not consents within the meaning of the Acts. The complaint of Mr. Ronan was, as he more than once stated, that the Estates Commissioners had been prohibited from deciding in favour of Lord Clanricarde, and I myself have no doubt if they had not been restrained they would have so decided, and that as regards result, the question before us is an academic one; but still the question is, when once that appeared, whether it was not the right of the party to seek to restrain the proceedings of the Inferior Court by prohibition before judgment. I think it was, unless it could be shown that there was laches or misconduct which took away the right, or it could be shown that the statute itself had taken away the right to a prohibition.

I think it clear that the fact of an appeal being given does not take it away. It is a prerogative writ, and so far as the statute is concerned it would, I think, require clear legislation to take it away. The appeals given by the Act under which the same question of jurisdiction could have been decided do no more, as the Chief Baron points out, than provide further safeguards and supply a discretionary but a cumulative remedy.

As to laches or delay, Lord Clanricarde was all along protesting that there was no jurisdiction; and though he petitioned on the 18th January, he did that to prevent the Estates Commissioners

(1) L. R. 2 H. L. 239.

making an order vesting the lands in the Land Commission. He applied before judgment given and while the case was in progress.

For these reasons, though on some and possibly the most important questions in the case, I am in favour of the appellants' contention, I feel coerced to hold, having regard to the facts which took place at the hearing in February, that prohibition lies, and that the orders of the King's Bench Division making absolute the conditional orders for prohibition were right and must be affirmed.

FITZ GIBBON, L.J. :—

Holmes, L.J., in the judgment which he is about to read, will state the course of the proceedings in this matter, to which the Lord Chancellor also has referred, as fully as the information and documents supplied to us have enabled this Court to do so. Holmes, L.J., will base his decision upon a single ground which appears to be sufficient and clear; and it has the additional merit of being the most practical way of dealing with the difficulties now in the way of the Estates Commissioners, leaving it open to them to proceed *de novo*, if so advised, when they have taken the necessary preliminary steps, not yet taken. Its legal foundation is substantially the same as that of the Chief Baron's judgment, with which I concur, though the point at which the Chief Baron finds a fatal infirmity in the position of the Commissioners is earlier in the proceedings, and the infirmity is somewhat different. A third and distinct objection to the action of the Commissioners, that founded on the failure to satisfy the provisions of section 1 (1) of the Evicted Tenants Act, 1907, was not open to consideration by the King's Bench, which was bound by the decision of the Chief Justice and Wright, J., as against the opinion of Madden, J., in *Hinds' Case* (1). That objection has been fully argued here, and I have arrived at a conclusion upon it (in the words of my Lord Chancellor in another case) "with such clearness as is consistent with other Judges having arrived at a different one." I think it is my duty to state my opinion

(1) *Ante*, p. 258.

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upon it, and to give my reasons. If I am right, it is a complete answer to the appeal, unless Lord Clanricarde has waived his right to rely upon it.

I refer to the statement of Holmes, L.J., for the details of the proceedings, and to his judgment and to that of the Chief Baron for fuller explanation of the reasons for their conclusions. I must give my own reasons for holding that, not having made any offer under section 1 (1), the Estates Commissioners had no jurisdiction to propose to acquire Lord Clanricarde's land compulsorily under section 2 (1).

The proceeding which the King's Bench has prohibited was originated by the publication in the *Gazette* of three notices under section 2 (1), dated respectively October 16, November 6, and December 3, 1908. The first two notices purported to comprise tenanted land, and, so far as they did so, they alleged consents to its compulsory acquisition by the tenants in possession, for the necessary purpose of complying with the Evicted Tenants Act, 1908. If there are no such consents, there is no jurisdiction to take Lord Clanricarde's estate in the tenanted land compulsorily.

The third notice appears to treat the land comprised in it as being untenanted. Within the prescribed time, Lord Clanricarde, as the person appearing to the Commissioners to be the owner of the lands, duly lodged objections dated November 12, 1908, alleging that all the lands were tenanted, and that no valid consents had been obtained from the occupying tenants, they being tenants of the class from whom land could not be taken without consent.

In these objections the point was not expressly taken that no offer had been made to Lord Clanricarde under section 1 (1), but he reserved the right to make all legal objections which he might be advised, when the proper time came for filing a petition against taking the lands without further inquiry.

Thereupon two documents were served on Lord Clanricarde, purporting to be offers under sect. 2 (4), both dated December 22, 1908. Each of these documents stated that no objection appearing to the Estates Commissioners to be valid had been raised to the acquisition of the lands set out in the schedule. I hold this to be, as held by Holmes, L.J., in *Hinds' Case* (1), a judicial

(1) 43 Ir. L. T. R. 75.

determination over-ruling his objections. It was made without hearing him, and without taking evidence to displace his allegations of fact. Each offer was of one specific sum, as the price of all the specific lands scheduled—£17,187 for 2,251A. 1R. 21P. in the case of the lands described as tenanted, and £11,180 for 1,028A. 1R. 33P. scheduled as occupied by Lord Clanricarde or Edward Shaw Tener, who seems to have been assumed to occupy as a bailiff for Lord Clanricarde.

In my opinion, each of these offers must be treated as one indivisible offer of a bulk sum for all the scheduled lots; neither the acceptance of it, nor the omission to present a petition for further inquiry, could take effect as completing a contract for purchase, or as enabling the Estates Commissioners to make a vesting order under section 2 (6), unless all the scheduled lands were sold for the whole price.

Within the prescribed month, on January 18, 1909, Lord Clanricarde presented the prescribed petition as to all the land comprised in each of these offers, praying that it should not be acquired without further inquiry. That prayer is in the statutory form, and I can conceive no form which could more clearly leave every objection to the compulsory acquisition of the land open to the petitioner, including any objection to the jurisdiction. Nor does it, in my opinion, exclude him from asserting the absence of jurisdiction by any proceeding otherwise open to him. Those petitions came on for hearing, and were fully heard by the Commissioners, on evidence and on hearing counsel, on February 16 and 17, 1909. The petitions had referred to the objections originally lodged to the *Gazette* notices, and they made further objections, including the objection that the conditions precedent to the compulsory acquisition of the said lands had not been complied with.

No conflict of evidence as to any matter of fact appears to have taken place at that hearing. I can find no matter of fact to be in controversy on the affidavits. It is not disputed that, with the exception of some twenty acres, all the lands included in the offers were tenanted; nor is it disputed that the occupiers included at least some tenants who could not be expropriated without their own consent in writing under the Act of 1908; nor has it been disputed here in point of law that the existence of consents, com-

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plying with the conditions of the Act of 1908, was essential, and was and is a condition precedent to the compulsory acquisition of Lord Clanricarde's estate in the lands.

The hearing ended, not by any announcement or decision as to either fact or law, nor by any admission that the Commissioners could or would proceed no further as the case then stood. On the contrary, it ended in the declaration of their intention to take the opinion, and to obtain the determination of the Judicial Commissioner upon questions of law, with a view to proceeding further. These questions were not definitely formulated, but the intention to submit questions of law, as the next step, was unconditional. Lord Clanricarde's counsel declined to take part in the settlement of any such questions. He denied their jurisdiction on the facts as they were, yet the Commissioners did proceed to prepare a memorandum to ground the submission of certain questions, as being of law, which included questions which showed that some at least of the lands proposed to be compulsorily acquired, were occupied by tenants who had signed no consent, that other lands were occupied by tenants who had signed certain documents described as consents under the Act of 1908, as to which the question was raised whether they were in sufficient compliance with that Act. Those documents have been produced here, and it has not been even suggested by the counsel for the Commissioners that they can operate as consents under that Act. They are mere expressions of willingness to take certain sums of money for certain holdings. But the questions further include the question whether the Estates Commissioners can properly pay these sums, and it has not been suggested here that they can pay any sum for an occupying tenant's interest, unless and until they have ascertained it as "compensation" in the prescribed manner, which has not been done. No doubt the Commissioners say that the statute gives them jurisdiction to hear and determine such questions; but the point is whether, when it clearly appears on the undisputed facts that there is no jurisdiction to take the land, the owner is estopped, by having petitioned for "further inquiry," from obtaining a prohibition against the further prosecution of proceedings under section 2. It appears to me that the action of the Estates Commissioners in declaring their intention to

submit these questions, upon a state of facts which did not enable them to acquire the lands comprised in the *Gazette* notices, or in the subsequent offers, or in the petition of Lord Clanricarde, was a threatening to exercise against him a jurisdiction which did not exist in law, on the facts proved and admitted. Persisting in an excess of jurisdiction under such circumstances is, in my opinion, properly the subject of prohibition. In the King's Bench and here this case has been pressed to a hearing by the Commissioners, upon the ground that their proceedings are being delayed in other cases, awaiting the decision of the questions argued in this case. A defendant over whom the facts give no jurisdiction cannot be involved in the settlement of questions of law for other cases, and there would be no object in allowing the proceeding, on the present *Gazette* notices and offers and petitions, to go on at all, if, as appears to be the case, the result must necessarily be either to drop the purchase of Lord Clanricarde's land, or, if the Commissioners want to acquire these lands compulsorily, a *da capo* movement which the Commissioners must begin, not where they left off on February 17, but by complying with the statutes and rules, and performing the conditions precedent thereby prescribed, where it is proposed to acquire land compulsorily under the Acts of 1907 and 1908.

Seeing that the present proceeding cannot result in a purchase, it is not for this Court, but it is for the Commissioners, first to decide whether any new proceeding shall be instituted, and next to begin it in accordance with the law. This I understand to be the ground on which Holmes, L.J., will dismiss the appeal. The Lord Chief Baron reached the same result, but at an earlier stage. As I understand his judgment, he approves, as I do, the decision of Holmes, L.J., in *Hinds' Case* (1), that an offer which declares that no objection appearing to the Estates Commissioners to be valid has been raised to the compulsory acquisition of lands, in a proceeding instituted by a *Gazette* notice, is a judicial determination affecting rights, and is a subject of appeal, and must be founded on jurisdiction shown to exist. Inasmuch as the Commissioners, without any evidence sufficient to prove that the lands comprised in their offers were lands which they had jurisdiction

(1) 43 Ir. L. T. R. 75.

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to acquire compulsorily, and with evidence to the contrary, overruled Lord Clanricarde's objection of November 12 by their offers of December 20, 1908, they acted without, or in excess of, jurisdiction. *A fortiori*, when they did so without giving him any notice, or any opportunity of being heard, their action was illegal and void.

It would be the merest question of form to discuss whether *certiorari* or prohibition is the more appropriate remedy in such a case. The declared intention to proceed to obtain the determination of legal questions by the Judicial Commissioner, when there was no jurisdiction on the admitted facts to take the lands compulsorily, is a wrong for which prohibition is an effective remedy; and we are told that Mr. Commissioner Bailey said, at the hearing, that the question of jurisdiction might be settled by applying for prohibition. I decline to turn the respondent round upon the merely technical ground either that *certiorari* is the proper form of proceeding, or that by petitioning for "further inquiry" he estopped himself from invoking the aid of the King's Bench Division, when the inquiry had gone far enough to show that the jurisdiction which the Commissioners were claiming to exercise did not exist.

As to the absence of an offer under section 1 (1) of a price appearing to the Commissioners to represent the value of the land, as a condition precedent to a proposal to acquire the land compulsorily under section 2, I adopt Mr. Ronan's description of the relation between the two sections. Section 1 contains the statement of the principle of the Act; section 2 creates the machinery, and defines the *modus operandi*, for acquiring land compulsorily under the Act. But the relation between the sections is only to be discovered by marking the distinction between acquiring land *generally* under section 1 (1), and acquiring land *compulsorily* under section 2.

Section 1 (1) contemplates the acquisition of "any land for the purposes of this Act"; but the acquisition of that land compulsorily for those purposes is authorized if, and only if, the application of compulsion to the person appearing to the Commissioners to be the owner has been shown to be necessary by their having offered to him, under section 1 (1), a price which appears to them to

represent the value of the land; and then only if he has not accepted the offer within the prescribed time. If during that time the offer is accepted, compulsion becomes unnecessary: the Commissioners can not then propose to acquire the land compulsorily; they may acquire it voluntarily, but section 2 does not come in at all.

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Wright, J., says of the offer under section 2 (4):—

> "If the offer is accepted, then, applying the principle of the English decisions, it is not a case of compulsory purchase. The power was always there; but, as the parties agreed, and as the offer was accepted, the necessity for compulsory purchase did not arise."

Why do these words not apply equally to the offer under section 1 (1)? So far from leading me to the conclusion that there is only one offer under the two sections, and that this offer is to be made under section 2 (4), after notice of publication in the *Gazette*, and that all sales, voluntary and compulsory, are within section 2, and are provided for by it, the words of the two sections, and the words of the statutory rules made under them, and the reason of the thing, all bring me to the opposite conclusion. The acceptance of the offer under section 1 gets rid of the necessity for either proposing or proceeding to acquire the land compulsorily under section 2; just as the acceptance of the offer made under section 2, if the Commissioners think fit to make it, gets rid of any further proceeding under section 2, excepting a vesting order under sub-section 6, unless some other person interested intervenes by petition under sub-section 5.

Under section 1, the first condition of all is that it appears to the Estates Commissioners expedient to acquire some specified "land for the purposes of the Act." In coming to this conclusion they must act "*ex informatâ conscientiâ*," not only as to the land, but as to the circumstances which make it appear to them to be expedient to acquire it. It is abundantly clear that the Commissioners have materials for deciding upon the expediency, and for estimating the cost and value, of acquiring lands for the limited purposes of the Act, without first putting the compulsory machinery of section 2, into motion. The words of section 1, as to the expediency and as to the offer, as two distinct

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conditions precedent are identical and cumulative. As to the offer they are—

> "And if they have offered to the person, appearing to them to be the owner, a price which appears to them to represent the value, and he has not, within the prescribed time, accepted the offer,"

then, and then only, they may acquire that land compulsorily for the purposes, and in accordance with the provisions, of the Act. An offer must have been made, and not have been accepted, under section 1, before the power to acquire any land compulsorily under section 2 arises, and until that power has arisen, and until the Commissioners have made up their minds to propose to exercise it, section 2 does not come into operation, and the Commissioners cannot publish the *Gazette* notice under section 2 (1), which is the first step towards acquiring *any land* "compulsorily under this Act."

Section 2 (4) shows that the offer which *may* be made under it differs in every respect from the offer which *must* be made under section 1. Sub-section 4 is permissive after, but not until after, the Commissioners have determined that no valid objection has been raised to the compulsory acquisition of the land. The offer may then be made by the Commissioners "if they think fit." Treating the offers under the two sections as one ignores every difference between them. The first must be made in every case in which the Commissioners think it expedient to acquire any land for the purposes of the Act, for what they believe to be its value. The offer under section 2 may be made "*if they think fit*"—that is to say, if, after considering the report of their Inspectors and all objections, still thinking the lands suitable for the purposes of the Act, and having determined that no valid objection has been raised to its acquisition by compulsion, they make up their minds to proceed to a *compulsory* purchase, they may then offer what appears to them *prima facie* to be a "reasonable price," which, if not accepted, will be fixed on appeal. I have never before heard it suggested that a "reasonable price" on a compulsory sale is the same thing as the intrinsic value of land bought and sold between contracting parties. So long as they are negotiators under section 1, the Commissioners, like any other willing purchaser, may offer the

sum which appears to them to represent the value of the land. If they find a willing seller, the sale takes place; but when going in for a compulsory purchase, they may, if they think fit, offer what appears to them "*prima facie*" to be a reasonable price to pay to a vendor who is forced to sell.

Surely, in a case of compulsory purchase, a reasonable price includes some consideration of compulsion, and of compensation for disturbance, beyond the mere value of a thing bought by a willing purchaser and sold by a voluntary vendor.

At the close of the arguments we for the first time saw the Statutory Rules signed by the Judicial and Estates Commissioners on October 24, 1907. They are still "provisional," though nearly two years in force. Rule 2 shows the extent of the knowledge of the lands which the Estates Commissioners must have before they commence proceedings under section 2 (1) for compulsory purchase; and Rule 4 provides that the prescribed time, within which "the person appearing to be the owner of the land may accept *an offer pursuant to the provisions of section* 1 (2) *of the Act*, shall be one month from the making of the offer."

The same rule prescribes the like period of a month for presenting a petition under section 2 (5), but that period runs from the making of the offer *under that section*. Rule 5 elaborately provides for the offer referred to in section 2 (4), and prescribes forms for it and for the notice to be given of it, and also for the filing and inspection of the offer notice and maps.

Mr. Campbell in his argument pointed out the injurious consequences of holding that the Estates Commissioners have no power to acquire any land for the purposes or under the provisions of the Evicted Tenants Acts, otherwise than by proceeding compulsorily, in every case, however insignificant or simple, putting into motion and working out all the machinery of section 2.

For these reasons I am clearly of opinion that, before proposing to acquire any man's lands compulsorily, the Commissioners must begin by offering him a price which appears to them to represent its value. If the offer is accepted, there is a voluntary purchase and sale; if not, they may, if they think fit, have recourse to compulsion. Not having made any offer to Lord Clanricarde,

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they started the machinery of compulsion against him without jurisdiction, and they must now be prohibited from working it further, unless his conduct has somehow estopped him, or has enabled them to do what would otherwise be beyond their jurisdiction.

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The objection that Lord Clanricarde is "too late" has been made at different points of the case; in my opinion it cannot prevail. It has been stated that the compulsory machinery was started by the publication in the *Gazette*, without any previous offer or communication whatever to Lord Clanricarde. What was he to do when his land was gazetted? If he did not lodge an objection, the Commissioners could, if they thought fit, make an offer under sub-section 4; or they might go on to fix a price under sub-section 8, subject to appeal. He lodged objections, and though he did not specify the non-compliance with conditions precedent, he reserved his right to make all legal objections when the time for the petition came. The prayer of the petition under the statute is that the land shall not be "so" (i.e. *compulsorily*) acquired. Surely on "further inquiry" an objection to the jurisdiction is a proper subject of consideration; convenience, and every other consideration, is in favour of hearing the whole case at the same time. The petitions specified non-compliance with the conditions precedent as one of the grounds of objection upon which Lord Clanricarde relied. As I understand the law, waiver cannot, in general, confer jurisdiction; and where there is no submission to jurisdiction, the objection may, in general, be taken at any time before judgment, unless the opposite party has been prejudiced. Consequences as to costs and otherwise can of course be adjusted. To the point repeatedly put by Mr. Jellett and Mr. Ronan, that Lord Clanricarde has prohibited the Commissioners from deciding in his favour, the answer is that he did not apply for the prohibition until they had announced their intention, not of deciding that they had not jurisdiction to take his lands, nor of reconsidering the objections which they had already held invalid without hearing him, but of stating questions of law for the determination of the Judicial Commissioner, which questions assumed that, on the facts, they had jurisdiction to take his land, if the questions of law were answered in their favour.

For these reasons I cannot agree with Johnson, J.; and I hold that it is contrary to the principles stated in *Cox's Case* (1), as well as unjust, to compel Lord Clanricarde now to go on with his petition for further inquiry before the Commissioners, when he has applied for a prohibition on the ground that they have no jurisdiction in fact, and they have offered no evidence to displace the case which he has made to show that they have none.

This ends my judgment. But I cannot resist the temptation to mention another matter. It has not influenced my decision, upon which I had made up my mind before I thought myself at liberty to look at the matter in question.

Mr. Campbell suggested, as explaining the peculiarities of the Act, that section 1 (1) was not in the Bill as introduced. As showing that, he referred to the words "provision of parcels of land" in section 1 (2), and I understood him to suggest that he was himself, to some extent, the originator of section 1 (1). Some days after the argument he came back, counsel on the other side coming with him, to tell us that section 1 (1) was part of the original Bill. I have had the curiosity to look at its history. In the Bill, introduced on June 27, 1907, section 1 (1) appears in these words:—

> "If it appears to the Estates Commissioners that it is expedient to acquire any land for the purposes of this Act, they may acquire that land compulsorily for those purposes, in accordance with the provisions of this Act, and may declare any land so acquired to be an Estate."

Upon that clause the only condition precedent to the compulsory acquisition of land was that it should appear expedient to the Estates Commissioners to acquire it for the purposes of the Act. In the House of Commons on July 17, 1907, this was opposed, as introducing compulsion at the will of the Estates Commissioners for the purpose of restoring evicted tenants, into a code which was otherwise essentially voluntary. It was moved to leave out the section. The Attorney-General assured the House that the compulsory powers were not intended to be put in force, unless it was necessary to do so. But the opposition refused to be com-

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forted by this assurance, and it was moved to leave out the word "compulsorily," which would make it clear that the Commissioners might acquire land voluntarily. These amendments were rejected; but on July 22 an amendment was proposed making it a condition precedent to compulsory purchase, in the case of any owner of land, that after being offered a reasonable price he had refused to accept it. The Chief Secretary's objection to that amendment was that it was "so fair and reasonable as to be already in the Bill by implication."

Thereupon Mr. Campbell asked him to accept an amendment, which he said would apply equally to the owner of untenanted and to the owner and occupier of tenanted land. Thereupon the Chief Secretary offered to consider the matter, and to introduce upon Report an amendment which would give effect to what he had said was already in the Bill by implication. On Report, *nemine contradicente*, on the motion of the Chief Secretary, the following words were introduced, and they were in the Bill as sent up to the Lords:—

> "If they have offered to the person appearing to them to be the owner of the land a price which appears to them to represent the *fair market value* thereof, and he has not, within the prescribed time, accepted the offer."

Indisputably this is a condition precedent to any proceeding to acquire land compulsorily, and equally indisputably "the fair market value" in that clause could not mean the same thing which section 2 (4) had from the beginning described as

> "Such price as appears to them *prima facie* to be a reasonable price."

In the Lords, amendments were carried, not only prescribing by way of condition precedent the inability of the Estates Commissioners to acquire suitable land by agreement and on reasonable terms under section 1 (1), but also substituting for the "fair market value" "*compensation* for the loss which would be sustained by the owner being deprived thereof."

Section 2 (4) also was amended by substituting for such price as appeared to the Commissioners *prima facie* to be a reasonable

price, the words "compensation to be paid as if the lands were about to be acquired compulsorily under the Lands Clauses Act, 1845."

Attention was called to the evidence of Mr. Commissioner Bailey as to the ability of the Estates Commissioners to ascertain the value of any land which they might think it expedient to acquire; but exception was taken to the way in which the "fair *market* value" might be fixed where a compulsorily expropriated owner was put to loss, by disturbance or otherwise, beyond the market value. On this argument "compensation" was substituted.

I venture to suggest that it might, in some cases, require some miraculous power to fix the "*fair market value*" of evicted holdings which had remained "untenanted," and presumably unmarketable, for a period which might go back to twenty-five years before the passing of the Land Act of 1903.

The Commons disagreed with the Lords amendments of section 1 (1), except one which extended the provisions for appeal to proceedings under that clause. This in itself shows that the proceedings under section 2 were not treated as the same as those under section 1 (1). But "a price which appears to the Commissioners to represent the value" was substituted for not only the Lords "compensation," but also for the Chief Secretary's "fair market value," and thus the condition precedent to the application of compulsion in section 1 (1) was finally enacted in the words which are now contended to be only a blundering anticipation of the provision for the same offer which may be made at a subsequent stage of the proceedings, when it is proposed that land shall be acquired compulsorily under section 2.

I decline to interpret any Act of Parliament by anything said or done about it before its passing; but in this case it may be some satisfaction to know that if the Attorney-General, or the Chief Secretary, were now in my place, and remained of the same mind as when section 1 (1) was finally amended, they would concur with me as to its intention and effect. I have already shown that the Judicial and Estates Commissioners put the same construction upon the Act when they framed the Rules of October 24, 1907. In my opinion the decision of the majority of the Court of King's Bench in *Hinds' Case* (1) cannot be supported;

(1) *Ante*, p. 258.

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and on that ground, as well as those on which the King's Bench and my colleagues have based their decisions, I hold that Lord Clanricarde is now entitled to a prohibition against further proceedings against him, unless, and until the statutory conditions precedent to compulsory purchase have been performed.

HOLMES, L.J. :—

Before referring to the legal questions arising in this appeal, I propose to state the circumstances that led to the litigation in so far as they are within my knowledge. I cannot, however, hope to do this fully or accurately, inasmuch as copies of some important documents, relied on by counsel, have not been supplied to the Court, and I am obliged to depend upon my memory for their contents; but I think I can state as much of them as is essential. The proceedings began by the Estates Commissioners publishing three notices in the *Dublin Gazette*, proposing to acquire compulsorily lands of which the Marquess of Clanricarde was the supposed owner. The first of these notices appeared in the *Gazette* of the 16th October last, the second in that of the 6th November, and the third in that of the 3rd December. All of these contained the particulars prescribed by section 2 of 7 Edw. 7, c. 56, sub-section 1, and the Rules made thereunder; and in addition thereto, the first and second, but not the third, contained a notice that, in so far as the lands are tenanted land, the respective tenants in possession or occupation have consented in writing to the compulsory acquisition of the lands by the Estates Commissioners, and that such consents are filed as a record in the office of the Land Commission. The schedules of these notices show what is apparently full knowledge of the situation, extent, and occupation of the several denominations proposed to be taken, and must have been the result of considerable investigation; but there had been no previous offer to, or communication with, Lord Clanricarde. The next step in the proceedings was his lodging with the Land Commission, within the prescribed period, a statement of the grounds of his objection to the acquisition of the lands described in the *Gazette* notices. I have no copy of these documents; but, if I remember aright,

they did not object on the ground that no offer of a price had been made previous to the publication of the *Gazette* notices, but they did state, as a definite and specific objection, in addition to other grounds, the fact that the lands were in the possession or occupation of *bona fide* tenants, using or cultivating the same as ordinary farmers in accordance with proper methods of husbandry.

Then followed two documents served by the appellants on Lord Clanricarde, purporting to be offers under section 2 (4) of the Act of 1907, and each dated the 22nd of last December. One of them, after reciting the notice in the *Dublin Gazette* of the 3rd December, and that no objection appearing to the Estates Commissioners to be valid had been raised to the acquisition of the land set forth in the schedule, offered the sum of £11,180 for the purchase of the same, in fee-simple, pursuant to the Act of 1907. Then follows a statement, that the Commissioners proposed to acquire the said lands at the said price, unless within one month a petition was presented praying that the said lands should not be so acquired without further inquiry. I have not seen the other offer; but I presume that it relates to lands mentioned in the *Gazette* notices of the 16th October and 6th November, and offers therefor the price of £17,187.

Thereupon two petitions were presented by Lord Clanricarde, on the 18th January last, pursuant to section 2 (7) of the Act, referring to the objections already lodged against the acquisition of the lands, and relying thereon as well as on the further objections that the conditions precedent to compulsory acquisition had not been complied with, and that the price offered was inadequate.

These petitions came on for consideration before the Estates Commissioners, on the 16th and 17th February; and what then occurred is to be found in the affidavits of Mr. Davidson, Lord Clanricarde's solicitor, and Mr. Drennan, the Assistant Secretary of the Commissioners. There was a full hearing in the presence of counsel and solicitors for Lord Clanricarde and for the evicted tenants who had applied under 1 (2) (*a*) of the Act, and witnesses were examined and cross-examined. In the case of the offer of £11,180 it was proved, and not contradicted or apparently questioned, that, with the exception of about 20 acres, all the lands

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set out in the schedule to this offer were tenanted lands, in the occupation of *bona fide* tenants, who had been for many years using or cultivating the same as ordinary farmers, in accordance with the proper methods of husbandry. It was also admitted that no consent of any kind had been obtained from the tenants in occupation of these lands, and it was objected on the part of the petitioner that section 1, sub-section 3, of the Act deprived the Estates Commissioners of jurisdiction to acquire such lands compulsorily.

In the case of the other offer of £17,187, it was proved without question that twenty-two of the holdings mentioned therein were tenanted lands, which for many years had been and were in the occupation of *bona fide* tenants, fulfilling the conditions mentioned in the proviso of section 1, sub-section 3, of the Act of 1907. The only answer given to this objection was the production of documents said to be consents within the meaning of 8 Edw. 7, c. 22, s. 1. I have no copies of these documents, but we have seen them, and it is clear that they are not consents within this provision. The distinguished counsel who represented the Commissioners in this and the Divisional Court have not suggested that they could be so regarded, and it does not require a lawyer to see this. At this stage it was contended on behalf of Lord Clanricarde that the Commissioners had no jurisdiction to proceed further; but this objection was overruled. Thereupon his counsel urged other objections, which would only be relevant if the objection founded on the existence of the tenancies were invalid. In this state of things the hearing before the Estates Commissioners came to an end, and it is not said that it was proposed to continue or renew it. On the contrary, they intimated, in the case of both petitions, their intention of referring the questions of law arising thereon to the Judicial Commissioner for his decision, pursuant to section 23 of the Act of 1903, thus assuming that they had ascertained the facts. But if this be so, what were the questions of law in which Lord Clanricarde had any interest? In the smaller offer there were none, while in the larger the only one was whether consents within the meaning of the Act of 1908 had been entered into. Counsel for the appellants read what purported to be a draft of the questions of law proposed to be submitted to the

Judicial Commissioner; but although I asked once or twice during the hearing for this paper, I only received it immediately before I began to write the paragraph which I am now reading. This is a very curious document. It begins with a memorandum which I had not heard of before, relating exclusively to four denominations of land, stated to be in the rated occupation of Francis Drury, for which it is said that there had been offered the sums of £820, £382, £268, and £50, making altogether the sum of £1520. From the beginning to the end of the argument in this Court no reference was made to such offers. We only heard of two offers, one for £11,180, of which I have a copy, the other of £17,187, of which I have no copy. I presume that this Francis Drury is tenant of four of the holdings set forth in the schedule to the last-mentioned offer; but unless this offer differs in its form and terms from the offer of £11,180, it was the offer of a price for all the lands included in the schedule.

It is true that I find in the schedule of the offer of which I have a copy a sum placed opposite each denomination; but that these were separate or independent offers of those sums was never hinted at by the appellants' counsel. It is, no doubt, stated in Mr. Davidson's affidavit that the Commissioners decided that they would deal separately with each parcel of land set out in the schedule to the offer of the 22nd December; but this is contradicted categorically in Mr. Drennan's affidavit. How it could have been supposed by any reasonable man that had read the statute that there were more or other offers than the two, within the meaning of section 2 (4), I am unable to conceive. If Lord Clanricarde, as many men in his position might have done, had presented no petition within the limited time, can anyone doubt that the purchase-money to be paid pursuant to section 2 (6) should have been the sum mentioned in the body of each offer?

I now return to the memorandum, confined as it is to Francis Drury's holdings. It sets out what is called his consent, which is given in consideration of £800, which was not paid, which no one had undertaken to pay, and which, I understand, the Lord Chief Baron held the Commissioners had no authority to pay—a point, however, which I have not thought it necessary to consider. The memorandum then proceeds to deal with other matters con-

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cerning the holding of Francis Drury; and then come the questions of law proposed to be submitted to the Judicial Commissioners, relating entirely to those holdings. It is right to say that this document was a mere sketch or draft, and that although eleven weeks elapsed from the close of the hearing before the Estates Commissioners, and the granting of the conditional order for prohibition, it was never completed. I asked counsel for the appellants more than once during the argument whether they contended that, taking the case and facts as they stood when the hearing before the Estates Commissioners closed, there was any question of law to be decided that would affect the result, or that any further step could be taken to enforce or go on with the offers, or either of them.

Mr. Ronan and Mr. Jellett are in the habit of giving every assistance in their power to the Court; and, moreover, I think my question was a pertinent one, for if they could have shown that there was an opening for further proceedings, it would have been, to my mind, almost a conclusive reason for not granting the writ of prohibition. But the only answer I received was, "The Commissioners were prevented from doing anything"; but there was not the most distant hint or suggestion of what they might or could have done. I accept this as the strongest confirmation of the correctness of the conclusion at which I have arrived, namely, that when the hearing of the 17th February ended, there could be no further litigation based on the offer. I can hardly doubt that the Estates Commissioners must have been so advised before, or immediately after, the making of the conditional order; and why they did not intimate to Lord Clanricarde's solicitor that they were not going to take further steps in the two matters, puzzles me. Some passages in Mr. Ronan's opening argument suggested to my mind that their object had been to have questions settled that may arise in other cases; but a private litigant is only interested in what concerns himself, and ought not to be put to expense and trouble to settle legal questions for the guidance of a public department—a proceeding the futility of which is illustrated by the result of the present appeal, which I venture to think is not likely to help in any other case. However, as the case is here, it must be disposed of; but I shall confine

myself to the two narrow questions on which I think our decision turns. The first is, whether, before any step towards compulsory purchase is taken under section 2, there must not be an offer to the owner by the Commissioners of a price which appears to them to represent the value thereof, under section 1, and that this offer is a condition precedent to proceeding under the following section. The majority of the King's Bench Division answered this question in the negative, holding that the statute contemplated only one offer, that under section 2 (4): *The King* (*Hinds*) v. *Estates Commissioners* (1); and the Divisional Court, being bound by this decision, did not consider it; but it has been fully discussed here. At first, I felt disposed to follow that authority upon the ground that the Legislature could not have intended the Estates Commissioners to offer a price for land before the inspection provided for by section 2 (3). Further consideration, however, made me doubtful for the following reasons—(1) It is difficult to understand the reference to an offer in section 1, if there was to be only one offer; (2) The fourth and fifth of the Provisional Rules made by the Land Commission under the Act, seem to treat the offer under section 1 as different from that under section 2; and (3) a careful perusal of the *Gazette* notices supplied to me shows a very ample knowledge of the parcels of land proposed to be taken, and leads me to think that the Commissioners would have no difficulty in ascertaining a price that would represent their value. I do not, however, express a final opinion on this point, as I am prepared to hold with the appellants on another ground. If an offer under the first section was necessary, every step taken by the Commissioners was without jurisdiction; and the writ of prohibition ought to have been sought at the earliest moment. But so far from this having been done the objections served contain no reference to it; and even in the petitions there is only the general statement that the conditions precedent to the compulsory acquisition of the lands have not been complied with it.

By these steps I hold that Lord Clanricarde must be taken to have waived this objection to the jurisdiction; and he cannot rely on it in support of the writ of prohibition. I am of opinion, how-

(1) *Ante*, p. 258.

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ever, that he is entitled to it on different grounds. I assume that up to the hearing in February there had been nothing in the action of the Commissioners to justify the issue of the writ. Amongst the objections lodged there was, as I have already said, one relying on the fact that the lands were tenanted within the meaning of the proviso in section 1 (3). I must assume that the Commissioners made some inquiry and gave some consideration to this objection before they held that it was invalid; but I have no knowledge of the nature of their investigations. In *Hinds' Case* (1) I held that this was a determination of the Estates Commissioners of a question arising under the provisions of the Act imposing restrictions on the acquisition of land, for which an appeal lay to me as Judge of Assize in the county in which the land was situate. I am still of the same opinion, and it would be a great misfortune if the law were otherwise, as such an appeal would, in many cases, settle at the earliest moment the only matter in dispute. In *Hinds' Case* (1) counsel for the Commissioners did not attempt to show that the objection was invalid. In fact, its validity was supported by authority which no Judge could venture to overrule. But although Lord Clanricarde *might* have appealed *at once*, he was not bound to do so. As I construe the section, he might present a petition for further inquiry, and might raise on such inquiry points of law and fact on which he had not relied in his objections. For these reasons I am of opinion that the hearing of the 17th February was perfectly regular, and could not have been prohibited; but as soon as it appeared on the evidence given thereat that the Commissioners had no jurisdiction to acquire the land compulsorily, there was an end of the offers. I am of opinion that, in these circumstances, they had no jurisdiction to submit questions of law to the Judicial Commissioner; and a writ of prohibition seems to me the most appropriate means of preventing them from doing so. I, therefore, hold that the orders of the Divisional Court are substantially right, and that the appeal must be dismissed.

I have said *substantially* right, because it may be suggested that there is a little ambiguity in their terms. The prohibition

(1) 43 Ir. L. T. R. 75.

from taking further proceedings for the compulsory acquisition of the land ought to mean further proceedings in continuation of the proceedings already taken, and I think that this is the true construction of the orders. They do not prohibit the Commissioners from beginning anew the procedure prescribed by the statute, if a change of circumstances should give them jurisdiction to acquire the lands, or part of them, compulsorily.

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Solicitor for the Marquess of Clanricarde: *Hutcheson Davidson.*
Solicitor for the Estates Commissioners: *W. Alexander.*

W. G.

CLIFFORD *v.* PIGGOTT (1).

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June 9, 28.

*County Court—Practice—Interpleader—Civil bill by a third party claiming goods taken in execution—Time within which such proceedings must be taken—*14 *&* 15 *Vict. c.* 57, *s.* 150.

In interpleader proceedings, under 14 & 15 Vict. c. 57, s. 150, brought against an execution creditor by a person claiming as his property goods taken under a decree, order, or process of a Civil-bill Court, the claimant's civil bill against the execution creditor must be returnable to the first place where Quarter Sessions are held in the division where the goods were seized, and for which the civil bill can be served in due time, after the date when the affidavit and money mentioned in section 150 of the said Act have been lodged with the sheriff by the claimant.

The decision of Andrews, J., in *Legge* v. *Neill* (23 Ir. L. T. R. 20) followed.

CASE STATED by Dodd, J., at the Spring Assizes for the county of Kerry, 1909.

1. The civil bill in this case was headed "Interpleader," and was brought for £23, £18 thereof being money lodged with the sheriff of the county of Kerry, on account of the seizure of eight heifers, plaintiff's property, and £5 damages for unlawful seizure. Copy civil bill hereunto annexed.

2. The defendant at the Cahirciveen Sessions, on the 29th day

(1) Before MADDEN and BOYD, JJ.

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of January, 1908, obtained a decree against one Daniel Mangan, for £13 17*s.* debt, £1 3*s.* costs, and 10*s.* witnesses' expenses. Copy extract from civil-bill book annexed.

3. On the 2nd day of July, 1908, the defendant, under colour of the said decree against Daniel Mangan, by a special bailiff and under warrant at the peril of the plaintiff therein (the defendant in this civil bill), at Coumdeveen in the district of Cahirciveen and Division of Killarney, seized and impounded eight cattle as the property of the said Daniel Mangan, which cattle were claimed by the plaintiff as his property.

4. On the 4th day of July, 1908, the plaintiff made an affidavit pursuant to 14 & 15 Vict. c. 57, s. 150, to the purport that the said cattle so taken as aforesaid were the *bona fide* property of the plaintiff, and lodged the said affidavit and the sum of £18, to cover the amount of said decree and bailiff's fees and pound and other charges, with the sheriff of the county of Kerry, where said cattle were seized; and thereupon the said sheriff issued an order for the delivering up of the cattle to the said Denis Clifford (the plaintiff), and transmitted the said affidavit to the office of the Clerk of the Peace as by the said statute provided. Copy affidavit hereunto annexed.

5. On the 23rd day of September, 1908, the said Denis Clifford (the plaintiff) caused the civil bill in the schedule hereto annexed to be issued against the said Patrick Piggott, returnable to the Quarter Sessions to be held at Cahirciveen, for the division of Killarney, on the 29th day of October, 1908. The plaintiff resides at Derrineden, about 14 miles south of Cahirciveen. The seizure took place at Coumdeveen about 7 miles south of Cahirciveen. The defendant is described in the civil bill as residing at Tooreenailougher, Glenbeigh, which is 15 miles from Cahirciveen, which is the nearest sessions town. It was stated by counsel for the defendant that such alleged residence was only colourably inserted, and that the defendant resides at Killarney. The fact was not proved either way.

6. There are three civil-bill divisions for General Quarter Sessions in the county of Kerry: viz. Tralee, Killarney, and Listowel. For the division of Tralee the County Court Judge sits at Tralee, at each Quarter Sessions, and at Dingle twice each

year, viz., at Easter and at Michaelmas. For the division of Killarney, the County Court Judge holds sittings as follows:—Killarney, each quarter; Cahirciveen, three times in every year: viz., for Hilary, Trinity, and Michaelmas Sessions; and Kenmare, twice every year: viz., Hilary and Trinity Sessions. There is only one sitting for the division of Listowel: viz., in the town of Listowel every quarter.

7. The Michaelmas Quarter Sessions for the division of Killarney, in 1908, were held as follows:—Killarney, on the 16th October, and Cahirciveen, on the 29th October.

8. When the civil bill aforesaid came on for hearing at Cahirciveen, on the 29th October, 1908, the defendant objected that the Sessions at Cahirciveen was not the Quarter Sessions for the division of the county next after the deposit with the sheriff; and contended that the civil bill should have been made returnable for the sessions held in the town of Killarney on the 16th October, 1908; he relied on the decision in *Legge* v. *Neill* (1) and the cases mentioned therein, and on section 150 of 14 & 15 Vict. c. 57. The County Court Judge dismissed the civil bill without prejudice, following the decision referred to.

9. The plaintiff appealed from the said dismiss to the Judge of Assize at the Spring Assizes, for the County of Kerry, 1909.

10. For the plaintiff it was contended that if the civil bill were a proceeding of interpleader it had been brought in time and should have been heard as such, and that in any event it was properly before the Court as a claim for money damages. I was asked to strike out the word "Interpleader," and to treat the civil bill as a claim for damages against the execution creditor. I said that it would alter the procedure entirely. The County Court Judge's order preserved such a claim, if well founded, and I declined.

The question for the determination of the Court is, whether the civil bill should have been returnable to the sitting or Court held at Killarney as being the first Court of the Quarter Sessions for the division in which the seizure was made next after the deposit with the sheriff?

(1) 23 Ir. L. T. R. 20.

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If the answer of the Court shall be in the affirmative, the order of the dismiss pronounced by the County Court Judge will be affirmed with costs.

If the answer of the Court shall be in the negative, the appeal will stand adjourned to the next Summer Assizes for the county of Kerry.

W. H. DODD.

Schedule I.—Copy civil bill, *Denis Clifford* v. *Patrick Piggott.*

Schedule II.—Copy of extract from civil-bill book. Entry of decree in civil bill, *Patrick Piggott* v. *Daniel Mangan.*

Schedule III.—Copy of interpleader affidavit made by Denis Clifford.

The above-mentioned documents were set out at length in the schedules to the case stated by Mr. Justice Dodd, but no question was raised as to their form or effect, and as their contents appear sufficiently in the case stated, it is unnecessary to print them in this report.

C. Murphy (*A. M. Sullivan, K.C.*, with him), for the plaintiff:—

These proceedings are brought under sect. 150 of 14 & 15 Vict. c. 57, which enacts that the civil bill "shall be returnable to the Quarter Sessions for the division of the county in which such seizure was made, next after such deposit with the said sheriff, provided that the same can be served on the defendant in due time for such next Quarter Sessions, and if not, then to the Session for the division next following, but not after." I contend that the limit of time prescribed by the section applies to the division as a whole, and does not make any distinction between the different towns where sittings for the division are held; and that the plaintiff is, therefore, at liberty to sue at a sitting for the hearing of civil bills at any town in the division. Throughout the statute 14 & 15 Vict. c. 57, the unit is the "division," not the "town or place," where civil-bill sittings are held. Section 15, which deals with the appointment of civil-bill officers, treats the "division" as the unit; so do sections 30 and 31, which are con-

versant with the arrangement of divisions and sessional towns; section 32 enables the Lord Lieutenant in Council to regulate the number of times at which General Quarter Sessions or civil-bill Courts shall be held in any "town or place," but I submit that this section is not inconsistent with the view that the Sessions is the Sessions of the division, not of the town or place. In replevin cases section 43 directs that the civil bill shall be heard in the "division or district" in which the distress was made, and section 69 enacts that a defendant shall not be sued in any sessions out of the "division" in which he resides. In the civil-bill proceedings in ejectment the proceedings must be brought in the Court for the division where the lands are situated: section 79; under section 109, the County Court Judge may adjourn a civil bill "to the next subsequent sessions for the same division."

The fact that a County Court Judge is expressly authorized by 27 & 28 Vict. c. 99, sect. 47, to adjourn the hearing of a civil bill from one division to another, while the Act is silent as to adjournments from one town to another in the same division, supports my contention that the sitting of a Civil-bill Court should be regarded as a sittings for the division, and not merely for the town or place where it is held: see also 39 & 40 Vict. c. 71, sect. 4.

The decision of Andrews, J., in *Legge* v. *Neill* (1) is against the view for which I contend, but that case was decided on circuit. *R.* (*Farquharson*) v. *Antrim JJ.* (2) was cited during the argument in *Legge* v. *Neill* (1); but if the facts of the case are correctly reported, it does not support the decision of Andrews, J., in the latter case.

I submit that *R.* (*Farquharson*) v. *Antrim JJ.* (2) merely decides that in an appeal under 24 & 25 Vict. c. 91, s. 19, where there is only one town in the division for which an appeal could be served in time, the appellant must appeal to Quarter Sessions at such town, and cannot wait until the sittings in the ensuing term; but it was not necessary to the decision of the case to hold that where there were sittings in two or more towns for which an appeal could be served in time, the appellant is bound to go to the first place where sittings are held.

(1) 23 Ir. L. T. R. 20.

(2) 8 Ir. Jur. (N. S.) 47.

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Bernard Roche and *P. D. Fleming, K.C.*, for the defendant:—

If the words "Quarter Sessions" in section 150 of 14 & 15 Vict. c. 57 mean "General Quarter Sessions of the Peace," then the plaintiff should have served his civil bill for Killarney, as that is the only town in the division where such Sessions are held. Admitting, however, as we do, that the words "Quarter Sessions" include any sitting of a Civil-bill Court, we contend that the plaintiff ought to have served his civil bill for the first place where there was a sitting of a Civil-bill Court in the division, provided the civil bill could have been served in time for that sitting, and, if not, then for the next sitting in that division. The unit in 14 & 15 Vict. c. 57 is the town, not the division: see, *e.g.*, sections 32 and 68; and, therefore, the words "Quarter Sessions for the division . . . next after such deposit" must mean the next place where Quarter Sessions are held in the division. In construing section 5 of 45 & 46 Vict. c. 29, the words "sitting of the County Court" were held to mean a sitting of the County Court for a particular place: *Smyth* v. *O'Kane* (1), which shows that the town is to be regarded as the unit.

Section 150 of 14 & 15 Vict. c. 57 was enacted to afford a cheap and expeditious means of having claims adjudicated on, and is an enactment in relief of claimants. It should be construed strictly against them: *Walsh* v. *Goodman* (2); particularly in regard to the time for taking action under its provisions.

R. (*Farquharson*) v. *Antrim JJ.* (3) supports the view taken by Andrews, J., in *Legge* v. *Neill* (4); see the judgment of Fitzgerald, J., in the former case at p. 50 of the report. We rely strongly on *Legge* v. *Neill* (4), which has been accepted as settling the practice in the County Court.

C. Murphy, in reply.

(1) 31 Ir. L. T. R. 168.
(2) 5 New Ir. Jur. 104.
(3) 8 Ir. Jur. (N. S.) 47.
(4) 23 Ir. L. T. R. 20.

MADDEN, J. :—

The plaintiff, on the 23rd of September, 1908, caused a civil bill in a proceeding by way of interpleader to be issued against the defendant, returnable to the Quarter Sessions to be held at Cahirciveen for the division of Killarney, on the 29th of October, 1908. It is found that there are three civil-bill divisions for General Quarter Sessions in the County of Kerry, viz., Tralee, Killarney, and Listowel. The County Court Judge holds sittings for the division of Killarney at Killarney, each quarter; at Cahirciveen three times in each year; and at Kenmare twice in each year.

The Michaelmas Quarter Sessions for the division of Killarney was held at Killarney on the 16th of October, and at Cahirciveen on the 29th of October. When the civil bill in this case came on for hearing at Cahirciveen on the 29th of October, the County Court Judge dismissed it without prejudice, on the ground that it ought to have been made returnable for the Sessions held at Killarney on the 16th of October, in accordance with the provisions of the 150th section of 14 & 15 Vict. c. 57. An appeal having been taken from his decision to Mr. Justice Dodd, the Judge of Assize at the last Spring Assizes for the County of Kerry, a case was stated for the opinion of this Court upon the following question :— "Whether the civil bill should have been returnable to the sitting or Court held at Killarney, as being the first Court of the Quarter Sessions for the division in which the seizure was made, next after the deposit with the sheriff ?"

The section to which I have referred recited that, in consequence of difficulties which may arise in the execution of decrees against goods, by reason of claims to property in the goods seized, "it is reasonable to afford a cheap and expeditious mode of adjudicating on such claims." It provides a procedure which eventuates in a claimant, on complying with the prescribed conditions, issuing a civil bill against the party at whose risk the goods have been taken in execution, stating that he claims the goods seized as his property. The section provides as follows :—"and the said civil bill shall be returnable to the Quarter Sessions for the division of the county in which such seizure was made next after such deposit

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with the sheriff, provided that the same can be served on the defendant in due time for such next Quarter Session, and if not, then to the Session for the division next following, but not after."

What is meant by the Quarter Sessions for the division next after the deposit? Does it mean the next ensuing sitting for the division of a Court of Quarter Sessions? or does it include the entire time during which a Court of Quarter Sessions shall be sitting for the division? The words are capable of either interpretation; but the former is suggested by the provision that if the defendant should be late for "such next Quarter Sessions," the civil bill may be served for "the Sessions for the division next following," but not after.

If the word in this proviso had been "sitting" instead of "session," there could be no doubt as to the meaning, and the words are nearly synonymous.

The former of these two possible constructions of the section was adopted after argument by Andrews, J. His decision, which was made on circuit, is briefly reported in a note in 23 Ir. L. T. R. 20, but the substance is clear. His judgment appears to have been influenced by a decision of this Court in *R.* (*Farquharson*) v. *Justices of Antrim* (1).

The decision of the Court of Queen's Bench in this case was upon a different statute. But it has an important bearing upon the present case by reason of the interpretation which the Court put upon the word "session" in its relation to the holding of Quarter Sessions. Referring to the statute 6 & 7 Wm. 4, c. 75, Mr. Justice O'Brien says: "It is impossible to say that the Sessions thereby directed to be held at particular towns were not separate Sessions, and not merely adjournments." The same view was taken by Hayes, J., and Fitzgerald, J.

The principle of the decision appears to be that the Quarter Sessions for a division are not to be treated as one continuous and indivisible thing, but that they are separate "sessions" or sittings in each town. I have no doubt that the Court would, applying this principle to the section before us, and having regard to the

(1) 8 Ir. Jur. (N. S.) 47.

expressed intention to provide an expeditious trial, have interpreted the section as directing the civil bill to be returnable to the sitting or Quarter Sessions held next after the dates of the deposit.

It was stated that the decision of Andrews, J., had been followed in practice. It certainly was by the learned County Court Judge in the present case. We accordingly answer in the affirmative the question in the case stated.

BOYD, J., concurred.

Solicitor for the plaintiff : *John O'Connell.*
Solicitor for the defendant : *Maurice M'Cartie.*

J. C. W.

RICHARDSON AND OTHERS *v.* THE COMMISSIONERS OF INLAND REVENUE (1).

Revenue—Estate duty—Policies of life assurance—"Interest purchased or provided by the deceased"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 1 (d).

Under the trusts of a marriage settlement, made in 1853, a wife became entitled for her life to the income of the settled property for her separate use, with a restraint on anticipation. In 1861 the wife verbally agreed with her husband, who had effected a policy of assurance on his life in 1859, that she would every year pay to him the income to which she was entitled under the settlement of 1853, when received by her, to be applied by him in paying the premiums on the said policy, and on any additional policies on his life which he might thereafter effect as their family increased, the object being that the wife should make provision for herself and her children after her husband's death. At the date when the said agreement was made there were four years' arrears of the wife's said income in the hands of the trustees of the settlement of 1853; and, in order to recoup the husband for the premiums already paid by him on the policy of 1859, the amount of the wife's said income for the two preceding years was, by her written order, paid to her husband by the trustees, the remaining arrears being added to the capital of the trust funds. From that date down to the husband's death in 1906 (except in the year 1896, when

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

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the income for that year was added to the capital of the trust funds) the wife's said income, when it reached the hands of the trustees, was, by her written order, paid by them to her husband for the purposes aforesaid. During the years 1861–1876 the husband, in pursuance of the agreement of 1861, effected five additional policies of assurance on his life. All the above-mentioned policies were kept up and became payable on his death. It was proved that the husband never was obliged to draw on his own resources for the purpose of paying the premiums on the said policies, as he was always in the position of having received more from his wife than he had paid in premiums, though he was never asked to account for the balance, and apparently used it for his own purposes.

By an indenture made in 1887, which recited that the husband was "entitled to" the said policies, which were set forth in a schedule, the husband assigned them to trustees, upon trust for his wife for life, and after her death for the children or remoter issue of the marriage, as he should appoint; and in default of appointment, for the said children in equal shares; and the husband thereby covenanted with the trustees to pay the premiums on the said policies. The wife was not a party to this deed, nor was any power of appointing the proceeds of the said policies given her thereby; and, though she knew of the execution of the said deed, she apparently did not understand its legal effect. By deed-poll subsequently executed the husband varied the powers of investment contained in the said deed of 1887, and modified, in regard to one of his children, the trusts therein declared; and by another deed-poll, in exercise of a power of appointment given him by the settlement of 1853, he directed that the property settled thereby should be held upon the trusts declared in the deed of 1887; but the agreement of 1861 was not altered, and the manner in which the aforesaid payments were made to the husband, and the premiums on the said policies paid by him, continued as it had been prior to the execution of the said deed of 1887. The wife survived the husband, and on the death of the latter estate duty on the proceeds of the said policies was claimed and paid.

On a petition of appeal, under the Finance Act, 1894, section 10, by the husband's executors to recover the amount of the estate duty so paid by them:

Held, (1) that, having regard to the substance of the transaction, rather than to the conveyancing form adopted to carry it out, the inference suggested by the deed of 1887 was insufficient to rebut the other evidence in the case, and that, by virtue of the agreement of 1861 and the payments made thereunder, the policies became the separate estate of the wife.

(2) That the real, as distinguished from the nominal, liability assumed by the husband by the deed of 1887 could have become effective only in the event of his surviving his wife, or in the event of the premiums on the said policies exceeding at any time the amount of his wife's moneys in his hands primarily applicable thereto; and that as neither event had happened, the

policies had not been to any extent purchased or provided by him within the meaning of section 2, sub-section 1 (*d*), of the Finance Act, 1894.

Lethbridge v. *Attorney-General* ([1907] A. C. 19) followed. *Attorney-General* v. *Robinson* ([1901] 2 I. R. 67) explained.

Quære: Whether the policies were impressed with any binding trust for the children of the marriage. *Semble:* They were not.

PETITION OF APPEAL, under the Finance Act, 1894, s. 10.

The petition was issued on June 14th, 1907, by George Fennell Richardson, Joseph Robert Richardson, and William Richardson, executors and trustees of the will of Joseph Richardson, who died on June 18th, 1906.

The petition contained, *inter alia*, the following statements:—

That the said Joseph Richardson had effected the following policies of assurance on his life, viz.—a policy dated January 5th, 1859, for £3000; a policy dated August 21st, 1861, for £2000; a policy dated September 25th, 1863, for £2000; a policy dated February 3rd, 1869, for £1,000; a policy dated February 12th, 1869, for £2000; and a policy dated April 13th, 1876, for £3000.

That the moneys payable on foot of all the said policies, including bonuses and additions on the death of the said Joseph Richardson, amounted to £23,702 12*s.* 9*d.*, and the other assets of the said Joseph Richardson amounted to £82,809 2*s.*, and that the Commissioners of Inland Revenue had claimed, and had been paid, estate duty at the rate of £6 per cent. on both the said sums with interest to June 13th, 1907.

It was submitted by the said petition that no duty was payable upon the moneys received on foot of the said policies, and that estate duty was assessable and payable upon the said sum of £82,809 2*s.* at the rate of £5 10*s.* per cent. only. The grounds upon which the petitioners relied were—(1) that the proceeds of the said policies were not purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person; (2) that the said policies were not kept on foot, nor were any premiums paid thereon, out of the moneys of the deceased; (3) that the said policies were not provided by the deceased under the trusts of a marriage or other settlement, or under any contract for value made by the deceased with his wife, or any other person; (4) that the said policies were kept on

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foot, and the entire premiums payable in respect thereof were paid by his wife out of her own private moneys.

The prayer of the petition was as follows:—

(1.) That it be declared that no estate duty is payable or properly assessed on the proceeds of the said policies.

(2.) That it be declared that the proceeds of the said policies should not be, and are not, properly included in the principal value of the estate for the purpose of ascertaining the rate per cent. at which estate duty is payable.

(3.) That the Commissioners of Inland Revenue be ordered to refund the estate duty paid on the proceeds of the said policies, and the excessive amount (if any) paid for estate duty by reason of the proceeds of the said policies having been included in the principal value of the estate.

(4.) For costs.

The facts which were pleaded in the said petition, and upon which the petitioners based their claim, appear sufficiently from the following affirmation of Mrs. Eliza Jane Richardson, widow of the said Joseph Richardson, and from her answers to the interrogatories administered to her by the Commissioners of Inland Revenue. The said affirmation was made, and the interrogatories administered under an order of the King's Bench Division, made on May 15th, 1908, by which it was ordered that the evidence of the said Eliza Jane Richardson on behalf of the petitioners should be taken by affirmation; and that the Commissioners of Inland Revenue should be at liberty to administer interrogatories to the said Eliza Jane Richardson by way of cross-examination, to be answered by her by affirmation; and that the petitioners should be at liberty by way of re-examination to have a further affirmation from her.

Affirmation of the said Eliza Jane Richardson, made on May 27th, 1908:

I, Eliza Jane Richardson, of Springfield, Lisburn, in the county of Antrim, widow, aged 79 years and upwards, solemnly and sincerely declare and affirm—

1. That I was married to the late Joseph Richardson in the year 1853, and under the trusts of a settlement made on my

marriage I became entitled during my life to the annual profits and income of certain property in the said settlement mentioned.

2. That in the year 1859 my said husband effected a policy of insurance on his life in the sum of £3000 with the Friends' Provident Institution, which said policy I am informed and believe was dated the 5th January, 1859, and was subject to the annual premium of £82 12*s.* 6*d.*

3. That in or about the year 1860 or 1861, an arrangement was arrived at between my said late husband and myself, whereby it was agreed that the annual premiums payable in respect of the said policy of insurance should be paid by me out of the income to which I was entitled under the said marriage settlement, and that the premiums on any other policies which my said husband should thereafter effect upon his life in pursuance of the said arrangement should also be paid out of my said income. The object and intention of this arrangement (which I believe was not reduced to writing) was that, by applying my said income to the payment of the premiums on the said policies during the life of my said husband, I was making provision for my children and myself after the death of my said husband, in case they and I survived him.

4. That it was in pursuance of the said arrangement that my said husband, between the years 1861 and 1876, effected the additional policies on his life which are set out in the petition in this matter; and such additional policies were effected as the number of our family increased, and it was for the purpose of carrying out the object and intention of the said arrangement that my said husband executed the deed of the 30th of December, 1887, mentioned in the said petition.

5. That in January, 1862, in pursuance of the said arrangement, I paid to my said husband the income to which I was entitled under the said marriage settlement for the years 1860 and 1861, and my said husband was thereby repaid the amount of the premiums previously paid by him for the years 1859, 1860, and 1861, in respect of the said policy effected by him with the Friends' Provident Institution on the 5th of January, 1859, and the premiums on a policy effected by him with the Imperial Life Insurance Company on the 21st of August, 1861. All and every

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of the premiums subsequently paid on foot of the respective policies of insurance mentioned in the petition have been entirely paid and discharged out of the said income to which I was entitled under the said marriage settlement.

6. That from the year 1862 the practice with regard to the payment of the premiums on the said policies was as follows:— The said premiums were paid in the first place as they became due by cheques for the respective amounts thereof drawn by my said husband in favour of the respective Insurance Companies on the firm of Richardson Brothers and Company (of which firm my husband was a partner), and the amounts of said cheques were debited to my said husband's account in the books of the said firm; and after the completion of each subsequent year or half year ending on the 31st December, or 30th June, I signed an order addressed to the trustees of the said marriage settlement directing them to pay either to my husband or to his order the amount of the income due to me under the said settlement for the year or half year ending on such 31st December or 30th June; and thereupon the said firm of Richardson Brothers and Company credited the account of my said husband with the amount of such income in the books of the said firm. I refer to orders signed by me, and dated respectively the 13th of January, 1862, the 3rd of January, 1906, and the 21st of July, 1906, upon which, marked respectively with the letters A, B, and C, (1) I have endorsed my name before affirming hereof.

7. The above facts are within my own knowledge.

The contents of the said indentures of 8th November, 1853, and of 30th December, 1887 (so far as they are material to the purposes of this report), were as follows:—

By indenture of marriage settlement, made on 8th November, 1853, between Joseph Richardson of the first part, Eliza Jane Fennell of the second part, and John George Fennell, John Grubb Richardson, and James Nicholson Richardson (the trustees)

(1) The form in which the orders referred to were given is shown at page 606, *post*.

of the third part, after reciting that a marriage was intended to be solemnized between the parties of the first and second parts, it was witnessed that the said Joseph Richardson granted unto the trustees all that a plot of land therein described and known as Elmswood, in the township of Wavetree, in the County of Lancaster, and the furniture and household effects enumerated in the schedule thereto, upon trust, from the solemnization of the said intended marriage, to permit the said Eliza Jane Fennell to have the use of the said furniture and effects, and the use, occupation, and enjoyment of the said lands, or to receive the rents and annual profits thereof for her life, for her sole and separate use, free from the control of the said Joseph Richardson, or any husband whom she might marry, "and so that she might not be able to dispose of or charge the same by sale, mortgage, or otherwise in the way of anticipation," with power to her, notwithstanding coverture, to give receipts for any interest, annual profits, or rents payable to her during her life under the trusts therein declared, and after the death of the said Eliza Jane Fennell, upon trust for the said Joseph Richardson for life, and after the death of the survivor of the said Eliza Jane Fennell and Joseph Richardson, upon trust for such persons as the said Joseph Richardson should by deed or will appoint; and, in default of such appointment, in trust for the children of the said intended marriage, in equal shares, subject to the limitations therein contained.

The said indenture contained a power to the trustees to sell the trust estate and to hold the proceeds, or the investments representing the same, upon the trusts thereinbefore declared concerning the trust estate.

At the date when the petition was heard the petitioners were the trustees of the said indenture of 8th November, 1853.

By indenture made 30th December, 1887, between Joseph Richardson of the one part, and George F. Richardson, Joseph R. Richardson, and William Richardson (the trustees) of the other part, after reciting that the said Joseph Richardson was entitled to the several life policies of assurance specified in the schedule thereto, and that he was desirous of assigning the same to the trustees thereof, and of settling the same in the manner and

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subject as thereinafter appeared, it was witnessed that for carrying into effect the aforesaid desire the said Joseph Richardson thereby assigned to the trustees the said policies and all moneys, bonuses, and additions to become payable thereunder, upon the following trusts:—Upon trust to receive the proceeds of the said policies, and to invest the same as therein mentioned, and to pay the annual income of the same to Eliza Jane Richardson, wife of the said Joseph Richardson, and her assigns, during her life; and, after her death then as to the trust premises, and the annual income thereof, in trust for the children, or remoter issue of the said Joseph Richardson by his said wife, at such times and in such shares as the said Joseph Richardson should by deed or deeds, revocable or irrevocable, or by will or codicil, appoint, and, in default of such appointment, in trust for all the children of the said Joseph Richardson and his wife in equal shares as therein mentioned.

The said indenture contained a covenant by the said Joseph Richardson with the trustees not to do or suffer anything whereby the said policies might become void or voidable; to pay the annual premiums thereon; and to effect new policies on his own life in substitution for any of the said policies which might become void; a power to the trustees, in case of default by the said Joseph Richardson in keeping up the said policies or any substituted policies, by sale, surrender, or mortgage of the subsisting policies to raise any sum of money necessary for, and to apply the same in payment of, the premiums on the subsisting policies, or in restoring such of them as might become void or voidable; a power to the said Joseph Richardson by deed or will to vary or revoke the trusts, powers, and provisions of the said indenture, and to declare new or other trusts for the benefit of his said wife, sons, or daughters, or their issue, as he in his absolute discretion should think fit.

The said indenture contained no ultimate trust of the trust premises, nor any power of appointment to the said Eliza Jane Richardson in default of appointment by the said Joseph Richardson (1).

(1) The policies set forth in the schedule to this deed are those to which the petition relates.

There were endorsed upon the said indenture two deeds poll, dated respectively 6th April, 1897, and 26th April, 1901, which merely varied the power of investment contained in the said indenture; a third deed poll, dated 4th July, 1901, was executed by the said Joseph Richardson, whereby, in exercise of a power reserved to him by the said indenture of 1887, he revoked a power thereby conferred on one of his daughters to appoint the income of her share in the said trust premises after her death to her then husband for his life.

By deed poll of 5th July, 1901, the said Joseph Richardson, in exercise of the power of appointment conferred on him by the said indenture of settlement of 8th November, 1853, appointed that after the death of the survivor of himself and the said Eliza Jane Richardson, the trustees of the said indenture of settlement should stand possessed of the trust premises comprised therein upon the like trusts, and with, and subject to, the like powers and provisions in all respects as were respectively expressed and declared in the said indenture of 30th December, 1887, together with the two deeds poll endorsed thereon of 6th April, 1897, and 26th April, 1901, and the said deed poll of the 4th July, 1901, of and concerning the trust premises comprised in the said indenture of 30th December, 1887.

The following interrogatories were administered on 4th September, 1908, by the Commissioners of Inland Revenue, pursuant to the said order of 15th May, 1908:—

1. Was not the premium payable in respect of the policy of insurance effected with the Friends' Provident Institution on the 5th January, 1859, for the year 1859, paid out of moneys the property of the late Joseph Richardson?

2. Was the arrangement alleged to have been come to in 1860 or 1861 reduced to writing?

3. Was the alleged arrangement made in the presence of any solicitor, or of any person other than the late Joseph Richardson and yourself?

4. Were not the premiums payable for the year 1860 and also 1861 in respect of the policy of the 5th January, 1859, paid out of moneys the property of the late Joseph Richardson?

5. Under what circumstances was the alleged arrangement of 1860 or 1861 made?

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6. The policies taken out since 1860 are alleged to have been provided by the late Joseph Richardson with moneys to which you were entitled under the marriage settlement of 8th November, 1853, and the premiums paid in the same manner. Had you any private means other than the moneys coming to you under this settlement?

7. To whom was the income payable to you under this marriage settlement actually paid up to 1862.

8. Under what circumstances did the indenture of the 30th December, 1887, come to be executed?

9. Did you, during the years from 1853 to 1887, receive from the late Joseph Richardson any property or income other than such as was provided for by the marriage settlement? And if so, give the details thereof.

These interrogatories were answered by the said Eliza Jane Richardson by affirmation dated 9th October, 1908, as follows:—

In answer to the said interrogatories, I, the above-named Eliza Jane Richardson, solemnly and sincerely declare, affirm, and say as follows:—

1. In answer to the first interrogatory—Yes; in the first instance this premium was paid out of moneys the property of the late Joseph Richardson, but he was afterwards repaid this sum out of the income to which I was entitled under my marriage settlement, as stated in the fifth paragraph of my former affirmation, dated the 27th of May, 1908.

2. In answer to the second interrogatory—No; I am not aware that it was ever put in writing.

3. In answer to the third interrogatory—No person was present other than the late Joseph Richardson and myself.

4. In answer to the fourth interrogatory—Yes; in the first instance these premiums were paid out of moneys the property of the late Joseph Richardson, but he was afterwards repaid these sums out of the income to which I was entitled under my marriage settlement as stated in the fifth paragraph of my former affirmation, dated the 27th of May, 1908.

5. In answer to the fifth interrogatory—In 1861 there were five children of my marriage with the late Joseph Richardson living, and he and I thought that some sure provision should be

made for our children and me in case of his death, and that effecting the policies and paying the premiums out of my moneys was a better way of my doing so than accumulating the income payable to me under the marriage settlement. There were seven children born afterwards, and all these children are still living except one.

6. In answer to the sixth interrogatory—I had a sum of not quite but nearly £2000, the income of which was accumulated and added to the capital moneys.

7. In answer to the seventh interrogatory—The property subject to the trusts of the marriage settlement originally consisted of the house and grounds of Elmswood, Liverpool, together with the furniture and household effects therein. The late Joseph Richardson and I resided there till the year 1857, when the said house and grounds were sold for the sum of £5500, which was subsequently invested in the names of the then trustees of the settlement. From that time up till the beginning of 1862 the income of the trust funds was accumulated, and then amounted to the sum of £1278 15*s.* 3*d.* Of this amount a sum of £685 1*s.* 3*d.* was paid in January, 1862, by my order to the late Joseph Richardson in pursuance of the arrangement as to the polices of insurance; and the balance of £593 14*s.* was transferred to the capital account of the trustees of the said settlement.

8. In answer to the eighth interrogatory—My husband and I had many conversations about the policies, and this deed was executed in order to make it quite clear that the moneys payable under same were for our children and me.

9. In answer to the ninth interrogatory—I received from the late Joseph Richardson a monthly allowance for my personal, family, and household expenses, and out of same I gave an allowance to each of my five daughters until they married. From the time of my marriage up to about the year 1866, I received a monthly allowance of £30; the amount was then increased to £50 a month, and afterwards to £60 a month, and about the year 1874 to £70 a month, and for a good many years before my husband's death I received £80 a month.

10. The above facts are within my own knowledge.

In 1857 the house and lands of Elmswood were sold; and the trust accounts commenced on 17th August, 1857, on the receipt of

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£5500, the proceeds of the said sale. After payment of certain expenses connected with the said sale the balance was invested, and the income was allowed to accumulate till 31st December, 1861, at which date the accumulations amounted to £1278 15*s.* 3*d.*

At the hearing of the petition the following books of account and other documents were put in evidence :—

(1) The account of the trustees of the marriage settlement of 8th November, 1853. This account was entitled "Trustees of the marriage settlement of Eliza Jane Richardson." The names of the trustees were then set out. The said account had been opened on 31st December, 1858, and it showed the sums paid in each year since 1861 by the said trustees to the said Joseph Richardson by order of the said Eliza Jane Richardson, and also the sums placed to the capital account.

(2) The original orders signed by the said Eliza Jane Richardson requesting the said trustees to pay the income of her separate estate to the said Joseph Richardson. The first of these orders was dated 13th January, 1862, and was in the following form :—"Please pay Joseph Richardson for me £685 1*s.* 3*d.*, being two years' interest and dividends for the years 1860 and 1861, and oblige your affectionate sister, Eliza Jane Richardson." These documents were signed every half year from 1862 down to the date of the said Joseph Richardson's death, with the exception of the year 1896, in which year the income of the trust fund was not paid to Joseph Richardson, but was added to the capital account. Six of the orders for the period 1864 to 1869 were missing.

(3) The private accounts of the said Joseph Richardson in the books of Richardson Brothers, of which firm the deceased was a member, and in whose books he kept all his accounts in the form of bank accounts. The said Joseph Richardson kept only one private account down to the year 1871, when he opened a special account called his "Insurance Account," to the credit of which were placed the sums received from the trustees of the marriage settlement of 8th November, 1835, and also all directors' fees earned by the said Joseph Richardson. Out of these sums were paid all premiums on policies of assurance on his life, fire insurance on his private property, and on a policy of accident insurance.

The various premiums were shown in the account, and at the end of each year the credit balance of the said account was transferred to another of his private accounts, generally to an account called his "Investment Account."

The said "Trustees Account," and the accounts of the said Joseph Richardson, taken together, showed that from 1861 down to 1906, with the exception of the year 1896, the whole of the income of the said Eliza Jane Richardson's separate estate was paid by the said trustees to the said Joseph Richardson, and was duly received by him. An abstract showing the amounts so received by him in each year, and the amounts paid by him in premiums on the policies in question, was put in evidence. This abstract showed that, except during a period extending from the years 1879 to 1887, inclusive, the annual payments made to Joseph Richardson exceeded the premiums paid by him on the said policies, and that taking any year from 1861 to 1906 the aggregate amount received by him during the years from 1861 onwards to the date selected exceeded the aggregate amount so paid by him during the corresponding period, the aggregate balance being £1601 5*s.* 3*d.* in 1879; and in 1888 £1482 0*s.* 11*d.* In 1906 this balance amounted to £1403 18*s.* 6*d.* These balances were not brought out in any of the accounts. They were obtained by a comparison of the figures in the above-mentioned books (1) and (3).

The manner in which the said accounts were kept, and the said payments made, was proved by the evidence of F. Sutton, who had been private secretary to the said Joseph Richardson, from the year 1893; of G. Jameson, book-keeper of the firm of Richardson Brothers; and of Joseph R. Richardson, one of the petitioners, who was also a trustee both of the settlement of 1853 and of the deed of 1887. In explanation of the fact that he became a party to the last-mentioned instrument without being made aware of its contents, this witness said:—"My father said simply that he wished me to be a trustee, and asked me to sign the document. He was a very reticent man, and did not discuss his affairs with any of his children."

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S. Ronan, K.C. (*S. L. Brown, K.C.* and *Denning* with him), for the petitioners :—

In this case duty is claimed only under sect. 2, sub-sect. 1 (*d*), of the Finance Act, 1894 (57 & 58 Vict. c. 30). Policies of life assurance come within the scope of this section : *Attorney-General* v. *Robinson* (1) ; the only question is, whether they have been "provided by the deceased, either by himself alone, or in concert, or by arrangement with any other person." The sub-section does not refer to the case of policies provided by any other person in concert or by arrangement with the deceased.

"The principle on which the Finance Act, 1894, was founded is that whenever property changes hands on death the State is entitled to step in and take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding" : *per* Lord Macnaghten, at p. 210 of *Earl Cowley* v. *Inland Revenue Commissioners* (2) ; and the general purpose of sect. 2, sub-sect. 1 (*d*), of the Act is "to prevent a man escaping estate duty by subtracting from his means, during life, money or money's worth, which when he dies are to reappear in the form of a beneficial interest accruing or arising on his death" : *per* Lord Loreburn, L.C., at p. 23 of *Lethbridge* v. *Attorney-General* (3).

The facts of the present case show that Joseph Richardson did not "subtract from his means during his life" for the purpose of paying the premiums on the policies in question. The entire funds which produced these policies and kept them alive were provided by Mrs. Richardson alone, out of her own free property. It is true that she was restrained from anticipating the income of her separate estate ; but a restraint on anticipation does not apply to arrears of income of a wife's separate estate ; and there was always in the hands of Joseph Richardson a balance consisting of the unexpended portion of payments previously made to him, sufficient to pay the premiums on these policies as they became due. He was never obliged to draw on his own resources for that purpose.

(1) [1901] 2 I. R. 67. (2) [1899] A. C. 198. (3) [1907] A. C. 19.

By paying to Joseph Richardson in 1861 two years' arrears of the income of her separate estate, in pursuance of the arrangement then made with him, Mrs. Richardson purchased the policy effected by him in 1859; and her evidence shows that she did this, and that she paid the premiums on all the policies in question, for the purpose of making a provision for herself and her children after Joseph Richardson's death. He merely acted as her agent in the matter. The policies represent her separate estate—whether impressed with an ultimate trust for her children or not is immaterial from this point of view—and therefore these policies have not "changed hands" on the death of Joseph Richardson.

In *Lord Advocate* v. *Fleming* (1) a father, by a gratuitous assignment made in 1883, assigned to his daughter policies of assurance on his own life, on which for many years he had paid the premiums; and from that date the premiums were paid solely by the daughter. The House of Lords held that neither succession duty nor account duty was payable by the daughter on the death of the father. Estate duty does not appear even to have been claimed. The present is a much stronger case, because the policies on which estate duty is now claimed never were the property of Joseph Richardson, with the exception of the policy effected in 1859, which was in effect purchased from him by Mrs. Richardson, under the arrangement of 1861. In *Attorney-General* v. *Dobree* (2) duty was held to be payable on policies of assurance, on the grounds that all the premiums thereon had been paid by the person on whose death duty was claimed; but the facts of the present case are the very reverse. Though a policy may have been provided in pursuance of a clear arrangement between the person on whose death duty is claimed in respect of it and another, yet if the deceased did not contribute in money, or in money's worth, towards the provision of the policy, no duty is payable in respect of it on his death: *Lethbridge* v. *Attorney-General* (3), *Attorney-General* v. *Murray* (4).

The case of *Attorney-General* v. *Robinson* (5) does not apply to

(1) [1897] A. C. 145.
(2) [1900] 1 Q. B. 442.
(3) [1907] A. C. 19.
(4) [1904] 1 K. B. 165.
(5) [1901] 2 I. R. 67.

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the present case. The decision in that case was based on the fact that the premiums on the policies on which duty was claimed were paid under the trusts of a marriage settlement, to which the deceased was a party, and for which he gave valuable consideration. It was held that the marriage settlement constituted a provision by the deceased. The arrangement in pursuance of which the policies in the present case were kept up was entirely independent of Mr. and Mrs. Richardson's marriage settlement, and the arrangement in question was not induced by any consideration moving from Mr. Richardson.

As to the effect of the deed of 1887, it can only be used by the respondents to contradict or discredit Mrs. Richardson's evidence. She cannot be bound by the deed, as she was not a party to it, and, apparently, its effect was not clearly explained to her. The form of the deed is inconsistent with her acts, both before and after its execution; and the manner in which the premiums were paid was not changed after the deed was executed. In questions arising on the Finance Act, 1894, and the Succession Duty Acts, regard should be had to the substance of the transaction on which these questions turn, rather than to the forms of conveyancing which the parties to them may have adopted to carry out their objects: *per* Lord Atkinson, at p. 26 of *Lethbridge* v. *Attorney-General* (1). I submit that the deed of 1887 can only be regarded as a precaution taken by Joseph Richardson to secure for the benefit of his wife and children the policies in question, and that it cannot otherwise affect their position.

The Attorney-General (*The Right Hon. R. R. Cherry, K.C.*) and the *Solicitor-General* (*R. J. Barry, K.C.*) (*Coll* with them) for the Commissioners of Inland Revenue:—

Without challenging Mrs. Richardson's candour or veracity, we submit that the Court ought not to act upon the recollection—untested by cross-examination—of a lady of her age and state of health, where her evidence is contradicted by a document such as the deed of 1887, which was drawn upon instructions given by the person who was best acquainted with the transactions in issue.

(1) [1907] A. C. 19.

We submit that the evidence really shows that the incomes of Mr. and Mrs. Richardson were pooled, and that the husband gave the wife any money which she required for household and family expenses, and dealt with the balance of the joint income as he pleased. The account books show that the whole of the income of the wife's separate estate was received by her husband, and that he paid the premiums on the policies; but the books do not establish any connexion between these two facts. The husband did not account for the surplus balance of the wife's income, nor have the petitioners treated his estate as being subject to such a liability. If these payments had been made to Mr. Richardson solely on account of the premiums of the policies in question, it is inconceivable that, as a man of business, he would not have opened a separate account for the receipts and payments in regard to these matters.

Being restrained from anticipating her income, Mrs. Richardson could not be bound by the agreement which she says was made in 1861. Her husband might, at any time, have found it necessary to pay these premiums out of his own money, and by the deed of 1887 he made himself liable to pay them.

This deed shows that Mr. Richardson regarded the policies in question as his property. He subsequently dealt with them as such, and his right to do so was never questioned by Mrs. Richardson, or by her trustees. She appears to have acquiesced in the action of her husband.

Apart from these considerations we submit that the question, Who paid the premiums? is not the sole test to be applied. If it were, then every case would come under section 2, sub-section 1 (*c*), of the Finance Act, 1894, and sub-section 1 (*d*) of the section would be superfluous. We admit that in the present case the liability to duty only arises from clause (*d*) of the sub-section, and that clause (*c*) does not apply; but if the Court should come to the conclusion that these payments were made by Mrs. Richardson to her husband in consideration of his effecting and keeping up the policies in question, or to induce him to do so, then duty on the policies becomes payable on his death: *Attorney-General* v. *Robinson* (1); *Attorney-General* v. *Riall* (2), at p. 134.

(1) [1901] 2 I. R. 67. (2) [1906] 2 I. R. 122.

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S. L. Brown, K.C., in reply :—

Mrs. Richardson faithfully carried out the arrangement of 1861 to which she had agreed in the only manner in which she was legally capable of doing. Now that the arrangement in question has been carried to its conclusion, the question whether it could have been enforced against her is immaterial.

The wording of the deed of 1887 is merely a matter of conveyancing form, and cannot be used against a person who was not a party to it. It is evident that the conveyancer who drew it was not properly informed of the antecedent facts. The document in question may be said to represent Mr. Richardson's method of carrying out his side of the arrangement of 1861, but it cannot affect Mrs. Richardson's rights.

June 29.

PALLES, C.B. :—

The question for decision here is, whether the Commissioners of Inland Revenue were right in law in insisting on taking into account the sums received on the policies of assurance in question as part of the property in respect of which estate duty became payable upon the death of Mr. Joseph Richardson, upon whose life they had been effected.

It was expressly admitted by the learned Attorney-General during the argument, and, in my opinion, could not have been controverted, that the policies did not come within clause (*c*) of sub-section 1 of section 2 of the Finance Act, and that the liability, if it existed, was under clause (*d*) of that sub-section. This admission not only limits the matter for decision to the applicability of that clause, (*d*), to the circumstances of the present case, but in addition has a material bearing upon the applicability of the latter clause. I say this because clause (*c*) of that sub-section, thus admittedly inapplicable, comprises all classes of property within section 38 of the Customs and Inland Revenue Act of 1885, including those brought within it by section 11 of the Customs and Inland Revenue Act of 1889, and consequently includes money received under policies of assurance effected by a person on his life, "where the policy is wholly kept up by him

for the benefit of a donee," or a part of such money, "where the policy is partially kept up by him for such benefit."

I assume, therefore, notwithstanding the provisions of the deed of 1887, that the Inland Revenue authorities are satisfied, as I am satisfied, that the policies in question were not kept up, either wholly or partially, by the deceased.

The general purpose of this clause (*d*), as neatly stated by the present Lord Chancellor in *Lethbridge* v. *The Attorney-General* (1), is "to prevent a man escaping estate duty by subtracting from his means during his life money or money's worth which, when he dies, is to reappear in the form of a beneficial interest accruing or arising upon his death."

Such being the purpose of the section, it is certainly a material circumstance that it is admitted, or, were it not admitted, that it is evidenced in a satisfactory manner by the contemporaneous entries given in evidence, that, from the time of the arrangement between Mr. and Mrs. Richardson, no money of the deceased was applied to the keeping up of the policies.

Coming now to clause (*d*) itself. Its material words are "interest" (which, according to *The Attorney-General* v. *Robinson* (2), includes policies) "purchased or provided *by the deceased*, either by himself or alone, or in concert, or by agreement with any other person." The clause does not include an interest "purchased or provided by any other person in concert or by arrangement with the deceased"—a distinction which was pointed out during the argument in the Court of Appeal in *The Attorney-General* v. *Murray* (3), and is involved in the *ratio decidendi* there. Concert or arrangement between Mr. Richardson and his wife, by reason of which the policies were purchased or provided, is therefore not sufficient *in itself* to impose liability to duty. To have that effect, the purchase or provision, in whole or in part, must have been made by Mr. Richardson himself. If the purchase or provision has been made by the wife alone, out of her separate estate, and if no part of the payments incident thereto have come out of the property of the husband for which he did not receive a full equivalent, so that nothing was, by reason of

(1) [1907] A. C. at p. 23. (2) [1901] 2 I. R. 67. (3) [1904] 1 K. B. 165.

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the provision, subtracted from his means, then, undoubtedly, the liability did not accrue.

Thus the question is one of fact—was it by Mr. Richardson, or by his wife, that these policies were "provided," within the meaning in which that word is used in the section? Were that question to be decided solely upon the construction of the deed of 1887, without reference to the acts of the parties anterior and subsequently to it, and consequently upon the assumption that, up to the execution of that deed, the policies were the property of the deceased, that the premiums had theretofore been paid by him, and that it was intended that he should continue to pay them thereafter without any right of recoupment out of the wife's separate estate, the case would have been too clear for argument, and the policies would have been undoubtedly subject to duty. But it is now settled (and it is expressly recognized by Lord Atkinson in *Lethbridge* v. *The Attorney-General* (1) as being settled) that a principle long adopted in cases under the Succession Duty Act must be applied also to those under the Finance Act, that regard must be had to the substance of the transaction under consideration, rather than to the conveyancing form which may have been adopted to carry it out. It must be admitted that the conveyancing form must not be left wholly out of consideration. It is material, as one—but only as one—of the elements to be resorted to in ascertaining the real substance of the transaction. I give to the form of the deed of 1887, to which I shall hereafter refer more in detail, all the weight to which it is entitled, by holding that it undoubtedly throws upon the appellants the *onus*—the very substantial *onus*—of clearly satisfying us that the policies were not effected or kept up in the manner in which, from the form of that deed, it is *primâ facie* to be assumed that they were.

As a step towards satisfying that *onus*, we have the fact, now incontestable, that, after the deed of 1887, the same course was pursued by Mrs. Richardson as had been adopted from the time of the arrangement, by the premiums not being paid by the deceased pursuant to the covenant in that deed, unless payment by the hand of the deceased out of moneys received by him out

(1) [1907] A. C. at p. 26.

of the separate estate of his wife was, as it must have been contemplated by both husband and wife as being, payment by the husband in pursuance of the covenant.

This course of conduct from the execution of the deed to the death of the husband, inconsistent as it was with the deed, read in its natural meaning, obviously prepares us to expect to find, upon inquiry, some state of facts which would account for the consent of Mrs. Richardson, repeated half year after half year during a long series of years, to the application of her separate estate, through the hand of her husband, to the satisfaction of a covenant of her husband, that covenant being one for the benefit of herself and her children. The continuous and repeated half-yearly acts of consent of the wife, evidenced by her half-yearly written orders, point to the well-known difficulty, experienced every day in practice, of dealing with income which is settled to the separate use of a wife without power of anticipation, as a security for the payment of premiums on policies of assurance intended as a provision for her children.

However, although a wife with such a restricted power over her income cannot bind that income until it has actually accrued due, her husband, who knows her character, can if he thinks fit trust and act upon her promise, and can bind himself by covenant, trusting to her promise to provide from her separate income the means of satisfying it, as fully as, had there been no restraint on anticipation, he could have trusted to an agreement by her which would have bound her separate estate.

To these considerations, arising from the course of conduct from the execution of the deed of 1887 to Mr. Richardson's death, I have to add the application of Mrs. Richardson's separate income from 1861 to the date of the deed to the payment of the premiums. In result, that a course of conduct which had been pursued for a quarter of a century prior to the deed was continued unvaried after the deed during the residue of the husband's life, although such continuance was inconsistent with the exact terms of the deed.

Nothing could be more cogent to show that it was not intended that the deed should alter the rights of the parties during the wife's life. I prefer a continuous and unvarying course of

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conduct during forty-six years to rebuttable presumptions to be drawn from any deed, especially from a deed to which the person principally interested was not a party, and which the mere fact of her not being a party proves that the conveyancer cannot have been instructed as to the material facts. I limit my opinion as to the intention not to alter rights to the life of the wife, for there was the intention to provide the additional security of the husband's covenant for payment of the premiums in case he should survive his wife.

Taking together all the matters I have mentioned, I come to Mrs. Richardson's testimony with a strong expectation to find that she will tell us that some such agreement as she has in fact deposed to was entered into between herself and her husband, some time about the year 1860 or 1861.

I have very carefully considered her evidence. I have given due weight to the danger of acting on the testimony of a witness (however desirous I may believe her to be to state nothing of which she does not believe herself to be absolutely certain) whose age and state of health have deprived us of the opportunity of hearing her orally examined before us. But, notwithstanding this, I have satisfied myself not only of her desire to state the truth, which the Attorney-General did not contest, but also of her substantial accuracy, confirmed as it is to a large, indeed I may say to almost its entire, extent by the contemporaneous entries in the books of the firm of which her husband was a member. I am therefore prepared to act upon that testimony, and to hold that the arrangement she deposes to was in fact entered into.

There is one matter, in relation to the view I take of that arrangement, to which it is right that I should advert. It may be that, to a certain extent, bounty towards the husband was one of the motives of the wife, because the premiums on the policies then existing were much less in amount than the wife's future yearly income, all of which was thenceforth to go to the husband; and it was in the contemplation of husband and wife that the effecting of policies, the premiums on which would exhaust the full amount of that income, should not be immediate, but, as to some, might be deferred, so that the policies should be

effected from time to time thereafter, as their family increased. No precise arrangement was made, that *all* the income of the wife should, at least at first, be applied to the payment of premiums. I rather think that there was an absence of agreement as to the unapplied income, both parties contemplating that ultimately policies should be effected whose premiums would exhaust the entire income if the future state of their family so required. For the carrying out of this intention I am satisfied that Mrs. Richardson largely trusted to her husband, whom she rightly regarded as being as desirous as she was that proper provision should be made for her children and for herself. I am, however, also satisfied that considerations of bounty to her husband, if any there were, were subsidiary to her desire to make a provision for her children and herself, which to my mind was the paramount and governing consideration. I therefore reject the suggestion that the arrangement was in its entirety a gift to the husband, with an expectation that he would apply the income to the payment of premiums on the policies, but without an obligation on his part to do so. The intention that her yearly income should bear the contemplated yearly burthen is, I think, clearly shown by the careful division, at the time of the arrangement, of the arrears of the wife's separate income. This division was, according to an exact arithmetical calculation, into two portions. Of these, one portion, amounting to exactly the income of the two previous years, the period during which some policies were in existence, *i.e.* the period during which some provision was made which would be available for the wife and children, was paid to Mr. Richardson in recoupment so far as was necessary of the premiums paid by him, and thereby, in my opinion, to purchase from him the policies which his payment of the premiums had called into existence. The residue remained to the credit of the trustees, and was thereafter dealt with by them, with, as I hold, the consent of Mrs. Richardson, as part of the capital of the trust fund. In other words, she dedicated definitively to trusts under which, upon her husband's death, would be available for the benefit of herself and the children the portion of her income which accrued during the time when no provision was being made

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for herself or the children. I am of opinion that, although Mrs. Richardson, by reason of the restraint against anticipating her income, was unable to agree with her husband in such a manner as to bind the future accruing gales of that income, she in fact agreed with him, as far as she was capable of agreeing, that the future accruing gales of her income should be applied in payment of the future premiums on the existing policies, and on any future policies which might be effected, as was then contemplated; and, to the extent of the actual payments by her in pursuance of that *de facto* agreement, I am of opinion that such agreement had the same effect as if Mrs. Richardson's income had not been subject to a restraint on anticipation.

I am further satisfied as a fact that there was not any agreement by Mrs. Richardson, or any intention on the part of either her or her husband, that he should have any interest in the policies. They secured sums which were not to become payable until his death, and which in the contemplation of the parties would not be available in his lifetime, or at least would not be availed of for his benefit; and I am also satisfied that the object and intention of the parties were that Mrs. Richardson should, by this application of her income, make a provision for herself and her children, to become available after her husband's death.

It is unnecessary to discuss whether any binding trust was created for the children. My opinion is that there was not; but that the effect of the arrangement and the payments made thereunder was that these sums remained the separate property of Mrs. Richardson until they were applied in pursuance of the arrangement, and that by the application of the two years' income which the husband received at the time of the arrangement, the then existing policies became in Equity the separate estate of the wife as purchaser thereof from her husband. I further hold that, in effecting each subsequent policy, Mr. Richardson acted as the agent and trustee of his wife; and that all the policies continued, at least up to the time of the execution of the deed of 1887, to be her separate estate.

Had it not been for the execution of that deed, the case would have appeared to me to be unarguable.

The purchase of the policies which were in existence at the time of the arrangement was effected by an amount of money actually paid which exceeded the value of the policies at the time. The case would have been much stronger than that of *The Lord Advocate* v. *Fleming* (1), and is governed by *Lethbridge* v. *The Attorney-General* (2). The other policies, although effected by and in the name of Mr. Richardson, were from the time they were effected bound in his hands by a trust for the separate use of his wife. Upon the assumption upon which I at present proceed, that is, putting out of consideration the deed of 1887, the words in which Lord Macnaghten, in the latter of those cases, *Lethbridge* v. *The Attorney-General* (3), gives his reasons for holding that the policies were not "provided" by the father, are precisely applicable. "It was not," says his Lordship, "by the father's gift, or at his cost, or by means of any expenditure on his part, that the policies were vested in the son. After they became vested in the son, they were, as it seems to me, kept up at the son's sole expense, and not to any extent or in any sense by the application of the father's income. . . . The son, in my opinion, acquired them," the policies, "by purchase. He gave more than an equivalent for what he received."

Substitute for the word "son" in that case the word "wife" in the present, and the words I have read accurately represent the relevant facts in the present case as they would have stood but for the deed of 1887.

This brings me to that deed. As to the circumstances under which it was executed, I believe Mrs. Richardson's affirmation. She says:—"It was for the purpose of carrying out the object and intention of the arrangement" (of 1860 and 1861) "that my husband executed the deed of 30th December, 1887." And, in answer to the 8th interrogatory, she adds—"My husband and I had many conversations about the policies, and this deed was executed in order to make it quite clear that the moneys payable under same were for our children and me."

This deed can be used by the Crown in two, but, as I think, only in two, ways. First, it can be used as discrediting Mrs.

(1) [1897] A. C. 145. (2) [1907] A. C. 19. (3) *Ibid.* at p. 25.

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Richardson's evidence, or rendering it so doubtful that it would not be safe to act upon it; and were it not for the other facts that have been so clearly proved, I should have had no hesitation in saying that it would have prevented me from acting on her testimony. But, as I have already said, taking that testimony with its powerful corroboration, I believe that lady to be truthful and accurate, and I do so notwithstanding any argument arising from her knowledge that her husband executed some deed settling the policies on herself and her children. She knew nothing of legal forms. She believed that the intention was to carry into effect in legal form the agreement she and her husband had been acting on for years. I do not believe that the covenant by the husband to pay the premiums on the policies in question was the result of any new agreement between the husband and wife. The fact that the wife was not a party to the deed, and the whole frame of the deed, show that the conveyancer was ignorant of the true facts. On its face the deed is the voluntary act of the husband, and in such a deed for such an object such a covenant was according to conveyancing form. The facts, so far as they can have been known to the eminent firm of solicitors who prepared the deed, neither called for nor left room for any agreement between the husband and the wife. The course of conduct after the deed negatives any such agreement, and the deed, to which the wife was not a party, did not divest her separate estate in the policies. I, therefore, reject the suggestion that the covenant by the husband was the result of an agreement between husband and wife, and for that reason I forbear to consider what the effect of such an agreement would have been in the events which have happened.

There is one fact in the case that demonstrates to me that Messrs. Crawford & Lockhart, the solicitors who prepared the deed, were not aware of the true facts; that is, that Mr. Richardson, the husband, was a gentleman engaged in trade, although, no doubt, in a very high position in trade. But, had the real facts been known to Messrs. Crawford & Lockhart—had they known that the policies had been kept up by the application of the wife's separate income to the payment of the premiums—it is inconceivable that these facts would not have been stated on the face of the deed, and that

the wife would not have been made a party to the deed, not only to bind her separate estate in the policies by the trusts for the children, but also to give the deed validity in the event of a contingency which, however unlikely, a professional man is not entitled to overlook in dealing with a voluntary assignment by a gentleman in trade, *i.e.*, possible bankruptcy.

So far as to the deed affecting Mrs. Richardson's credibility, or evidencing any new agreement between her and her husband. The only other effect that it can, in my opinion, have relevant to the case, would arise from the fact that it contained a covenant by Mr. Richardson to pay the premium. Now, here again, we must ascertain the real facts, as distinguished from that which appears on the face of the deed. The real, as distinguished from the nominal, liability imposed upon Mr. Richardson by that deed, taken in connexion with the true facts known to the parties, and with the confidence which Mr. Richardson had that his wife would continue in the future to fulfil her promise as she had fulfilled it previously, was one which could have become effective only in one of two events—either (1) in the event of the husband surviving his wife, in which event there would be no fund of the wife's applicable to the keeping up of the policies; or (2) in the event of the amount of the premium to be paid at any time exceeding the amount of the wife's moneys in his hands primarily applicable thereto—an event that might possibly have taken place, as, for instance, by the depreciation or the loss of securities in which the wife's separate estate was invested. Had either of those events happened, and had Mr. Richardson actually paid premiums above the amount he received from his wife's separate estate, the case would have been a different one; and might, as to part of the moneys secured, have become within clause (*c*), as to which I say nothing. But neither event has happened.

I am therefore of opinion that the appellants are entitled to have the policies excluded from the property which became liable to estate duty by reason of the death of the deceased. This will affect not only the amount upon which duty is to be calculated, but also the rate of duty. The figures can be adjusted by the appellants' solicitors and the solicitor for the Inland Revenue; and

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in the event of disagreement the case may be set down for further directions. The appellants will also have their costs against the respondents.

Mr. Justice Andrews has read this judgment, and I am authorized by him to say that he concurs not only in the result, but in the reasoning through which it has been arrived at.

I desire, however, to add a few words with regard to the case of *The Attorney-General* v. *Robinson* (1), to the decision in which I was a party. I do so, not in reference to this case, upon the decision in which it has no bearing, but because from what has taken place at the bar, and from what I have read in the reports of the arguments of counsel in England, I think that to a certain extent that decision, or at least the grounds upon which it proceeded, has been misapprehended. It is to be borne in mind that, as stated in the report, the settlement there had been executed upon a marriage which took place in 1843, long prior to the Married Women's Property Act, and therefore that, had the settlement not been executed, the personal property to which Mrs. Robinson was entitled, £3500, would have vested in the husband absolutely had it been in the actual possession of his wife; or, if it were a *chose in action*, could have been reduced into possession by him and thus become his property; and, further, that any dealing at that time with that £3500 to which he had not consented, would have been a fraud upon his marital rights, and voidable as against him. The true effect of the marriage and of that settlement was, that the pecuniary consideration that passed from him included an appropriation, with his consent, of a sufficient portion of the interest on the £3500 to the keeping up of the policies, and, therefore, in all strictness he provided the policies within the meaning of clause (*d*) out of property to which he would, but for the settlement, having been actually or potentially entitled. In my judgment upon this point I thought the matter so clear that I used but a few words in reference to it, especially as, the judgment being one which dealt with other questions of law some of which were difficult, I did not care to lengthen it by recapitulating facts which were in the contem-

(1) [1901] 2 I. R. 67.

plation of all interested—the parties, the Judges, and the counsel. I treated the question simply as an unarguable one. I may refer to page 90 of the report, where I said, "Now were they" (the policies) "'so purchased or provided'—that is, were they purchased or provided by the deceased in concert or arrangement with his wife? I cannot frame to my mind any doubt that the marriage settlement constituted a provision by the deceased, by arrangement with his wife, that the policies in question should be so kept up that on the death of the survivor of the husband and wife the whole beneficial interest in the moneys thereby assured should accrue and arise to the children of the marriage; that such beneficially acquired interest did in event accrue and arise accordingly, and that the marriage settlement brings such 'interest' of the children into clause (*d*) of section 2."

I mention this because I do not wish my judgment to be quoted as an authority for a proposition which I had not then even considered, viz., that property brought into settlement by a wife, when no pecuniary consideration moves from the husband, necessarily becomes liable to duty under the Finance Act on the husband's death.

JOHNSON, J.:—

I entirely concur in the whole of the decision of the Lord Chief Baron.

Solicitors for the petitioners: *Richardson & Craig.*

Solicitor for the respondents: *R. Martin*

J. C. W.

K. B. Div.
1909.
April 20.
June 4.

JOHN ROWAN *v.* MARGARET DOWNING (1).

Licensing Acts—General business on licensed premises—Structural separation—Saturday night—Sunday—Intoxicating Liquors (Ireland) Act, 1906 (6 *Edw. 7, c.* 39), *s.* 2.

Section 2 of the Intoxicating Liquors (Ireland) Act, 1906, provides, *inter alia*, "Where any business, other than the sale of intoxicating liquors, is carried on in the licensed premises, the whole of such premises shall be closed at the hours aforesaid, unless the portion of the same in which such sale of intoxicating liquors is carried on is structurally separated from the remainder of the building:—"

Held, by a majority of the Court (Lord O'Brien, L.C.J., Palles, C.B., and Andrews, J., dissenting), that the words "hours aforesaid" in the foregoing provision are not restricted to closing hours on Saturday nights, but mean prohibited hours generally.

CASE STATED by the Justices at Timoleague Petty Sessions for the opinion of the King's Bench Division upon section 2 of the Intoxicating Liquors (Ireland) Act, 1906 (6 Edw. 7, c. 39). The case came before the Court in the ordinary course, and was adjourned for consideration by a specially constituted Court consisting of seven of the Judges of the Division. The case stated at Petty Sessions was as follows:—

At a Petty Sessions holden in and for the Petty Sessions District of Timoleague in the county of Cork, on the 19th day of October, 1908, before us, the undersigned Justices of the Peace, acting in and for the said county of Cork in the Petty Sessions District aforesaid, one Margaret Downing of Timoleague, publican, was charged in and by a certain summons for that she, the defendant, being a person duly licensed to sell intoxicating liquors at her licensed premises at Timoleague, in the county of Cork aforesaid, did, at a time prohibited by law, and at a period during which such licensed premises are by law required to be closed, to wit, at or about 10 a.m. on Sunday, the 20th day of September,

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and ANDREWS, JOHNSON, MADDEN, WRIGHT, and DODD, JJ.

1908, unlawfully keep open such licensed premises for the sale of intoxicating liquors, against the form of the statute in such case made and provided—Licensing Acts (Ireland) 35 & 36 Vict., c. 94; 37 & 38 Vict., c. 69; and 6 Edw. 7, c. 39.

And the said parties respectively being then present, the charge was duly heard before us, and upon such hearing we adjudged that the charge be dismissed, and we accordingly dismissed it on the merits.

And whereas the said John Rowan, Esq. (1), hath, pursuant to the provisions of the before-mentioned statute, given us notice and required us to state and sign a case setting forth the facts and grounds of our determination upon the hearing of the said complaint, in order that he might take the opinion of the said Court thereon.

Now we, the said Justices, pursuant to the said notice and the provisions of the said statute, do hereby state and sign such case as aforesaid as follows—

At the hearing of the said complaint it was proved on the part of the complainant that the said defendant keeps a public-house at Timoleague, in which drapery and other goods are also sold; that Constable Sheehan entered the said public-house about 10 a.m. on Sunday, the 20th day of September, 1908; that he found the front of the premises ajar or partly open, and found inside a woman named Ellen Driscoll standing at the drapery counter in the licensed premises, ostensibly purchasing draperies. This woman was admittedly not a *bona fide* traveller. She stated to the constable at the time, and swore at Petty Sessions, that she was in the public-house for the purpose of buying drapery goods only; and the defendant justified her presence on the licensed premises on the same grounds, namely, that she was purchasing drapery goods only. The Court accepted the statement of defendant and person found on the premises, and found, as a fact, that there was no evidence from which it could be inferred that the said Ellen Driscoll was on the premises aforesaid for the purpose of obtaining intoxicating liquor, or upon any other business than that of purchasing drapery goods. There was admittedly no form

(1) District Inspector of Constabulary at Clonakilty, complainant in the summons.

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of separation between the drapery counter and the drink counter, which are opposite, and run parallel to each other in the same apartment of the house. It was contended on the part of the prosecution that, in the absence of any structural separation between the drink counter, or place where the intoxicating liquors were sold, and that portion in which drapery and other goods are admittedly sold, the provisions of section 2 of the Licensing Act of 1906 (6 Edw. 7, c. 39) applied in the circumstances, and that in the absence of such structural separation as is referred to in said section the defendant was bound to keep her shop closed for all purposes of business during the whole of Sunday as well as on Saturday night after the closing time.

The Court considering it doubtful whether this provision of the law was applicable to Sundays or whether its operation was restricted to Saturday nights only, gave the defendant the benefit of their doubts, and dismissed the charge.

And hereupon the judgment of the Court is now respectfully solicited, whether we, the Justices concerned, were right in our determination in this case, or whether, on the contrary, we should have held that the provisions of section 2 of 6 Edw. 7, c. 39, requiring that, in the absence of structural separation, licensed premises in which more businesses than one are carried on, are to be closed at certain hours on Saturday nights for all business purposes, are also applicable to Sundays—in other words, whether the provisions of said section are applicable to Sundays as well as to Saturday nights.

The Solicitor-General (*R. J. Barry, K.C.*), *Ignatius J. O'Brien, K.C.*, and *Dudley White*, for the complainant.

Norwood, for the defendant.

The arguments sufficiently appear from the judgments.

The following cases were referred to :—*Reg.* (*Williams*) v. *Doherty* (1); *Hyland* v. *Hamilton* (2); *Brigden* v. *Heighes* (3); *Tassell* v. *Ovenden* (4); *Richardson* v. *Sweeney* (5); *Cohen* v. *South-Eastern Railway Co.* (6).

Cur. adv. vult.

(1) 33 Ir. L. T. R. 170. (3) 1 Q. B. D. 330. (5) 42 Ir. L. T. R. 174.
(2) 36 Ir. L. T. R. 193. (4) 2 Q. B. D. 383. (6) 2 Ex. 253.

DODD, J.:—

This is a case stated for the opinion of this Court by the Justices sitting at a Petty Sessions Court at Timoleague, on the 19th October, 1908, at the instance of the District Inspector of Police.

Margaret Downing, of Timoleague, publican, was charged in the summons that she being a person duly licensed to sell intoxicating liquors at her licensed premises at Timoleague, in the county of Cork, did, at a time prohibited by law, and at a period at which such licensed premises are required to be closed, to wit, at or about 10 a.m. on Sunday, the 24th day of September, 1908, unlawfully keep open such licensed premises for the sale of intoxicating liquors, against the form of the statute in such case made and provided—Licensing Acts (Ireland) 35 & 36 Vict. c. 94; 37 & 38 Vict. c. 69; and 6 Edw. 7, c. 39.

The wording of the summons, which strictly follows the wording of the statutes, is, in my judgment, worthy of careful attention. The offence is keeping open licensed premises at a time prohibited by law, and at a period during which such licensed premises are required to be closed.

Constable Sheehan proved that he entered the public-house about 10 a.m. on Sunday, the 20th September, 1908; that he found the front door of the premises ajar or partly open, and found inside a woman named Ellen Driscoll standing at the drapery counter, ostensibly purchasing draperies. She stated to the constable at the time, and swore at Petty Sessions, that she was in the public-house for the purpose of buying drapery goods *only*, and the defendant justified her presence on the licensed premises on the same grounds, namely, that she was purchasing drapery goods *only*.

The Court accepted the statement of the defendant and person found on the premises, and found as a fact that there was no evidence from which it could be inferred that the said Ellen Driscoll was on the premises aforesaid for the purpose of obtaining intoxicating liquor, or upon any other business than that of purchasing drapery goods. There was admittedly no form of separation between the drapery counter and the drink counter, which are opposite, and run parallel to each other in the same apartment of the house.

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It was contended on the part of the prosecutor that in the absence of any structural separation between the drink counter or place where the intoxicating liquors were sold, and that portion in which drapery and other goods are admittedly sold, the provisions in section 2 of the Licensing Act of 1906 (6 Edw. 7, c. 39) applied in the circumstances, and that in the absence of such structural separation as is referred to in the said section, the defendant was bound to keep her shop closed for all purposes of business during the whole of Sunday as well as on Saturday night after closing time.

The Court, considering it doubtful whether this provision of the law was applicable to Sundays, or whether its operation was restricted to Saturdays only, gave the defendant the benefit of the doubt, and dismissed the charge.

And the question stated by the Justices for our determination is—Whether the provisions of said section are applicable to Sundays as well as to Saturday nights?

The system on which legislation in respect of hours and times of opening and closing licensed publichouses in Ireland is based is this—The 43rd section of the Refreshment Houses (Ireland) Act, 23 & 24 Vict. c. 107, is taken as the section regulating such hours and times, and every alteration made by subsequent Acts is directed to be read into that section. The first alteration was made by section 78 of the Licensing Act of 1872. It altered the hours of opening for Sunday, Good Friday, Christmas Day, and days of public fast or thanksgiving. It altered the times of closing on such days, and also altered the times of closing in towns not exceeding 5000 of a population, and all other places on week days from 11 o'clock, as it stood in the 43rd section, to 10 o'clock at night. The next alteration was for Sundays. The Sale of Liquors on Sunday (Ireland) Act, 1878, made provision for that in the words following:—"All the provisions of any Act now in force whereby the sale or exposing for sale of intoxicating liquors, or the opening or keeping open of any premises for the sale of intoxicating liquors, is prohibited during any hours or times on Sundays are hereby extended to the whole of Sunday in all places except the following; (that is to say) within the Metropolitan Police District of Dublin Metropolis, and within the cities of Cork,

Limerick, and Waterford, and the town of Belfast; and within the said police district, and within the said cities and town the said hours or times are hereby extended, and shall be as follows, that is to say, up to the hour of 2 o'clock in the afternoon, and after the hour of 7 o'clock in the evening on Sunday."

That was a temporary enactment. Then comes the Act we have to interpret, 6 Edw. 7, c. 39.

The first section makes perpetual the section I have just read, and it is now to be taken as part of the Act of 1906, save that the closing hour in the five excepted places is to be 5 o'clock instead of 7. Then follow provisions as to Saturday. The Act alters the hours for closing on Saturdays to 10 o'clock in all cities or towns the population of which exceeds 5000, and to 9 o'clock at night in all other towns and places in Ireland.

And then it proceeds to direct that these hours shall be read into the previous enactments, "which shall be amended in this particular, and shall apply as if the said hours respectively were specified therein as the hours at which licensed premises are required to be closed on Saturdays."

That is a direction or instruction to the reader. Please insert in the general table of hours and times for closing licensed premises these hours for *Saturday*. When that has been done, this sentence has spent its force. It disappears from the Act, and the table of hours and times as amended in this particular takes its place.

Having amended the table of hours and times, the section next tells us to apply to the amended table the provisions as to penalties. Let us do this also. The provision then reads: "Any person who sells or exposes for sale, or opens or keeps open any premises for the sale of intoxicating liquors at any other times than those limited for such purpose by section 43 of 23 & 24 Vict. c. 107, as the same is amended by section 78 of the Act of 1872, by the Sunday Closing Act of 1878, and by the Act of 1906, or during such times as aforesaid allows any intoxicating liquors to be consumed on such premises, shall for the first offence be liable to a penalty not exceeding £10, and for every subsequent offence to a penalty not exceeding £20." And then, and not till then, comes the sentence we have to inter-

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pret: "Where any business other than the sale of intoxicating liquors is carried on in *the* licensed premises, the whole of such premises shall be closed at the hours aforesaid, unless the portion of the same in which such sale of intoxicating liquor is carried on is structurally separated from the remainder of the building."

By what restrictive process can the hours aforesaid be confined to one only of the prohibited periods? "*The* licensed premises" are premises to which the provision as to penalties applies. "The hours aforesaid" are hours during which the sale is prohibited. The very words "as aforesaid" are used in the penalties section to indicate prohibited hours. The hours for Saturday have been read in as if they had been in the original section. Why not take *all the hours aforesaid*, those in the first clause, as well as those in the second? This at least. The only reason apparently is that there is not a new section. If the sentence to be construed were headed Clause 3, there could, I should say, be no question. Is there any reason in fact for including Saturday and excluding Sunday from the operation of the clause? It is a matter of history that this closing early on Saturday has only come in as part of the general movement for Sunday closing. I stay not to dwell upon the fact that the exposing of haberdashery wares for sale on Sunday is in itself a thing forbidden by law. By putting together two wrongs it is sought to make one right. To close early on Saturday would be a work of supererogation, an unnecessary self-denying ordinance, for the publican if this provision is confined to Saturday. He will find in loss a gain to match. He can have the whole day on Sunday if he will only get up a drapery counter. Nay, he need not get up a drapery counter; a tobacco counter will do as well. Nay, the one counter will do; the liquors need not even be under lock and key. The door need not be ajar only; it may be wide open. The police may prosecute in vain. Something was said in the course of the argument about the title of the Act. The title might then be amended to the Saturday Early Closing, and Sunday Opening Act.

As so much was said about the title, I may be pardoned for saying that in this point of view the title at the head of the Act is all in favour of at any rate bracketing Sunday and Saturday

together. The title at the head of the Act is, "To amend the law relating to the sale of intoxicating liquors on Saturdays *and* Sundays, and for other purposes connected therewith"; and the one provision supposed to be included in "other purposes" is the one under consideration. Well, if it must be so, let it be confined to a Saturday and Sunday purpose. Why divorce them just when it is most vital that they should be united?

Though Saturday is the first on the title, Sunday is the first in the enactments, and the whole scope of the Act is to make Sunday closing effectual by commencing it at 9 or 10 o'clock on Saturday.

It would appear clear, then, that on a reasonable construction Sundays at least must be included; and this is what the case stated submits, and this only.

During the argument, however, it was strenuously urged that you cannot confine the provision to Sunday. You must extend it to every day as well. I am quite prepared to do so. I think the provision coming in as it does, after applying the penalties sections to the "amended hours," proceeds to define what closing for the purposes of the penalty section is. It means closing; and a public-house is not closed, it says, unless the whole of it is closed. It must be structurally separated from any other place of business, otherwise the mischief which it is intended to avert will continue. And I do not find anything in the title to prevent this interpretation. The title in the body of the Act is, "The Intoxicating Liquors (Ireland) Act, 1906." Contrast this with the title in the Act of 1878, which is "The Sale of Liquors *on Sunday* (Ireland) Act." I do not think, however, this really assists in the interpretation. That must depend upon the context, the nature of the case, and the reasons to be offered.

And for the reasons aforesaid (and the word "aforesaid" is not in this sentence to be confined to the sentence immediately preceding; it extends to all the reasons throughout my judgment) I think the sentence under discussion really means this—where any business other than the sale of intoxicating liquors is carried on in the licensed premises (in respect of which the provisions as to penalties are sought to be put in force), the whole of such premises shall be kept closed during prohibited hours, unless the

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The words of the sentence are practically identical with the words of Mr. Justice Mellor's judgment in *Brigden* v. *Heighes* (1): "I do not see anything to prevent a draper carrying on the business of a grocer, *provided that the premises upon which the sale of liquor takes place are sufficiently divided from those in which no liquor is sold at all*," p. 334. The learned Judge seemed to qualify that judgment in *Tassell* v. *Ovenden* (2). The Legislature adopted almost the very words of the learned Judge in the earlier case (and that case was not either a Saturday or a Sunday case), and incorporated them as a legislative declaration of what closing meant. I am of opinion, therefore, the question of the magistrates should be answered, Yes.

WRIGHT, J.:—

The facts have been stated by my brother Dodd. I need not repeat them, and propose to state shortly my decision on the question or questions submitted to us, with the reasons for so deciding.

The Act of 1906, 6 Edw. 7, c. 39, applies to the whole week, and is not confined to Saturday and Sunday. This, in my opinion, is clear, not merely from the title of the Act, but from the provisions as to *bona fide* travellers contained in section 3.

In the case of the present defendant, a publican carrying on business in the village of Timoleague, in the county of Cork, the premises are by law required to be closed for the whole of Sunday; as regards the whole of that day opening is prohibited. Previous decisions of this Court, *R.* (*Williams*) v. *Doherty* (3), and *Hyland* v. *Hamilton* (4), appear to lay down that to open and keep open the door of a public-house during prohibited hours, although none but *bona fide* travellers are served, is an opening and keeping open the licensed premises for the sale of intoxicating liquors, and is illegal.

Mr. Justice Madden, in delivering the judgment of the Court

(1) 1 Q. B. D. 330.
(2) 2 Q. B. D. 383.
(3) 33 Ir. L. T. R. 170.
(4) 35 Ir. L. T. R. 193.

(The Lord Chief Baron and Mr. Justice Madden, Mr. Justice Kenny dissenting) in *Richardson* v. *Sweeny* (1), and in reference to this very Act, section 2, says that the words in the Act, "shall be closed," mean closed for the purpose of business. Further, that "closed" and "open" are correlative terms, and "a public-house which is not closed in the manner prescribed by the licensing code must, in my opinion, be taken by necessary intendment to be open within the meaning of that code—that is to say, open for the sale of intoxicating liquors. The section, as I read it, enacts no new offence. If I thought otherwise, I should adopt much of the criticism of my brother Kenny. It, in my opinion, prescribes certain conditions as to closing, with the necessary result that in the absence of compliance with these conditions there can be no effective closing of the licensed premises." That is a decision of this Court, which we, the full Court specially convened, can, I assume, over-rule, if we think it is erroneous; but as it represents the decision at which I would arrive, and states it with absolute clearness and accuracy, I entirely adopt it. Section 1 of that Act, 6 Edw. 7, c. 39, deals with Sunday closing; the earlier part of section 2 deals with Saturday night closing, and is immediately followed by a general enactment amending the several licensing laws in Ireland as to the closing hour.

The words "hours aforesaid," in the following part of the section (commencing with the words "where any business other than") mean the closing hours in the several licensing Acts already referred to, as amended by that Act; and accordingly it follows that where, as here, the sale of drink and any other business are carried on in the one shop, with no structural separation, the premises shall be closed for all purposes during the prohibited hours, and that to open them for the purpose of carrying on the business, other than the sale of intoxicating drink, is an offence, namely, the offence of opening and keeping open when they should be closed. The clause applies to the whole week, and is not limited to Saturday.

On the facts proved in this case as stated, I am of opinion that an offence was committed, and that the magistrates ought to have convicted.

(1) 42 Ir. L. T. R. 174.

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MADDEN, J.:—

If we would appreciate the nature and extent of the mischief which was under the consideration of the Legislature when it enacted the provision before us, we need not look beyond the facts of the present case. Margaret Downing was the owner of a shop in Timoleague, in which she carried on the business of a publican, and also that of a draper. Both businesses were carried on in the same apartment, in which there were two counters, running parallel, without any separation between them. At an hour when a public-house could not lawfully be open, the door leading from the public street to this shop was invitingly "ajar or partially open." A woman who was not a *bona fide* traveller was found present in this shop as a customer. The magistrates accepted the statement of the publican and customer that the customer was on the licensed premises only for the purpose of buying drapery goods. This may have been so as a matter of fact. But that licensed premises so circumstanced should be held by a bench of magistrates as not open for the sale of intoxicating liquors, is a striking illustration of the danger to the community against which the Legislature endeavoured to afford protection.

The cases in which the Court of Queen's Bench in England held licensed houses in which a double business was carried on to be closed for the sale of intoxicating liquors, bear no resemblance to that before us. In each of these cases, the part of the premises in which intoxicating liquors were sold was closed as far as was possible, short of a structural separation between the two divisions. In *Tassell* v. *Ovenden* (1) the wines and spirits ordinarily sold in the shop were kept in a case closed with shutters and locked. Notices were hanging on the case and placed in the shop windows informing the customers that they could not be supplied after 10 o'clock. In *Brigden* v. *Heighes* (2) there were two shops separated by a wooden partition without any means of communication, except through the dwelling-house of the owner of the premises.

Recognizing the danger of violation of the licensing law, even in such a state of things as existed in the English cases, the Legislature said in effect to the owner of a double business carried on

(1) 2 Q. B. D. 383. (2) 1 Q. B. D. 330.

in licensed premises, "You may keep open your drapery warehouse at the hours prohibited for the sale of intoxicating liquors; but if you do so, you must provide a structure which will completely separate the two divisions of your premises. If you fail to do so, and keep open for the sale of drapery business after the hours prescribed for the closing of licensed houses, the entire of the premises will be deemed to be open for the purposes of the penalties imposed by the Licensing Code." This is the interpretation of the section under our consideration which this Court adopted in *Richardson's Case* (1).

Now, it is evident that the mischief which the Legislature intended to prevent had no exclusive reference to any particular day of the week. It could arise on any day, at any hour at which the licensed premises could not be lawfully kept open for the sale of intoxicating liquors. It is equally plain that the remedy—a structural alteration of the house in which the businesses were carried on—is not of a kind which could be reasonably required for the purposes of sale upon a single day of the week. Thus it appears that a construction of the section that would confine its operation to hours of closing on a certain day or certain days in the week would be neither co-extensive with the mischief nor appropriate to the character of the remedy with which the section is conversant.

Bearing this in mind, I approach the consideration of the question, What are the hours during which licensed premises must be closed in the manner prescribed by the Act? They are described as "the hours aforesaid." If the Act of Parliament had been self-contained and complete in itself, we should have expected to find an enumeration of these hours within the four corners of the Act of Parliament. But the section is not so constructed. The system of legislation by reference and incorporation is attended with many inconveniences; but, in the present instance, it affords a means of giving to the words which I have quoted an interpretation which is in accordance with the intention that should reasonably be attributed to the Legislature. The portion of the second section which precedes the clause under consideration does not profess to prescribe the hours during which

(1) 42 Ir. L. T. R. 174.

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public-houses may be lawfully kept open. It refers to, and thus incorporates, the provisions of the existing statutes, in regard to penalties and otherwise, relating to selling or exposing for sale or purchasing intoxicating liquors at any hour, and it amends the provisions so incorporated as regards Saturday, in certain particulars. The hours which were so amended are those prescribed by 23 & 24 Vict. c. 107, sect. 43, which enacts that public-houses may be lawfully kept open on week-days between the hours of seven in the morning and eleven at night. These are, in my opinion, the hours to which the words which I have quoted apply. The word "aforesaid" is technically correct, for the portion of the second section preceding these words must be read as if the portion of 23 & 24 Vict. c. 107, s. 43, referring to the hours of opening were written into it.

On this part of the case I entirely concur with and adopt the analysis of the statutes which is contained in the judgment of my brother Dodd.

JOHNSON, J.:—

The question for decision on this case is, whether the magistrates were right in dismissing on the merits a summons against the defendant, a licensed publican, for unlawfully keeping open her licensed premises for the sale of intoxicating liquors on Sunday. The case finds that the defendant keeps a public-house at Timoleague in which drapery and other goods are also sold; that the constable on Sunday found the front door of the premises ajar or partly open, and a woman, not a *bona fide* traveller, standing at the drapery counter purchasing drapery goods only; and describes the premises—"There was admittedly no form of separation between the drapery counter and drink counter, which are opposite, and run parallel to each other in the same apartment of the house," which was a licensed public-house. If a person keeps open a drapery shop, no one can reasonably doubt that she does so for the purpose of selling the drapery she deals in to any customer who comes to buy those commodities, and, whether a customer comes or not, the shop is kept open for the purpose of selling the drapery all the same; and so if a licensed publican, with her name over the front door, describing herself as a licensed

publican (as by law required (1)) keeps open her public-house, no one can reasonably doubt that she does so for the purpose of selling the intoxicating liquors she deals in to any customer who comes to buy those liquors, and whether a customer comes or not the public-house is kept open for the sale of drink all the same. The Liquor Code has been progressively restrictive of the sale of intoxicating liquors in licensed premises on Sunday—first, by limiting the hours or times for the sale of liquor on Sunday, and next, by prohibiting such sale at any hour or time on Sunday; but as it was or is lawful to carry on a legitimate trade such as drapery in the licensed premises on Sunday, it was not difficult to evade the vigilance of the police, even if a constable was told off to watch such premises as those now under consideration during the whole of Sunday, unless the part of the licensed premises in which liquor is sold is separated structurally from the part in which the lawful business is carried on. In the two English cases, *Brigden* v. *Heighes* (2) and *Tassell* v. *Ovenden* (3), the places and businesses were separated as far as practicable, and those cases, therefore, are not authorities in the present case. The Refreshment Houses (Ireland) Act, 1860 (4), authorized a licensed person to keep his house open, and to sell liquor on Sunday between the hours of 2 and 11 p.m.

The Licensing Act, 1872 (5), recites—"It is expedient to amend the law for the sale by retail of intoxicating liquors and the regulation of public-houses and other places in which intoxicating liquors are sold"; and although the defendant's place of business may not be a "public-house," as that expression is commonly understood, it certainly is within the term "other places" (in the preamble of this Act) where liquor is sold. One of the objects of this statute was to abridge the hours for keeping open any premises for sale of intoxicating liquor on Sunday. Section 78 therefore enacts that, notwithstanding the provisions of section 43 of the Act of 1860, "it shall not be lawful for any person to keep open any premises for sale of intoxicating liquors on Sunday after 9 p.m. in any city or town the population of which shall exceed

(1) Licensing Act, 1872, s. 11.
(2) 1 Q. B. D. 330.
(3) 2 Q. B. D. 383.
(4) 23 & 24 Vict. c. 107, s. 43.
(5) 35 & 36 Vict. c. 94.

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5000, nor elsewhere after 7 p.m."; but evasion of prohibited hours is so facile that the Legislature, after a trial of this system for six years, considered this prohibitive legislation insufficient to meet the mischiefs of Sunday trading in drink, especially in such premises as these now under consideration, and, therefore, in 1878 passed the Act entitled "An Act to prohibit the sale of intoxicating liquors on Sunday in Ireland" (1), reciting, "Whereas the sale of intoxicating liquors in Ireland is prohibited during certain hours on Sunday, and it *will be for the public benefit* to extend such prohibition (save in five excepted cities and towns) to the whole of that day (Sunday), and with a view to such extension otherwise to amend the law regulating licensed houses in the manner by this Act provided." Section 1 enacts that "all the provisions of any Act now in force, whereby the keeping open of any premises for the sale of intoxicating liquors is prohibited during *any hours or times on Sunday, are hereby extended to the whole of Sunday except*" in the five excepted cities, "where the said hours or times are hereby extended up to 2 p.m. in the afternoon, and after 7 p.m. in the evening on Sunday"; and by section 2 all penalties for "keeping open" any premises for the sale of intoxicating liquors *during any hours or times on Sunday are extended to* any violation of the provisions of this Act. This Sunday Closing Act was, by sect. 7, to continue in force until 31st December, 1882, but was continued from time to time by the Expiring Laws Continuance Acts. In places of this kind, where there was no form of separation between the legitimate business which it was lawful in the licensed premises to carry on during Sunday, and the rest of the licensed premises where it was not lawful to sell drink on Sunday, any person under colour of dealing at the legitimate business counter had simply to turn round and get drink at the opposite counter, and the only check on this was to have a constable stationed on the door during all Sunday, whose vigilance might be easily evaded. Therefore the Legislature in 1906, once and for all, to put an end to this mischievous state of things without affecting the honest traders' business, passed the Act of 1906, entitled "An Act *to amend* the law relating to the sale of intoxicating liquors in Ireland *on*

(1) 41 & 42 Vict. c. 72.

Saturdays (the usual pay day of the working classes) *and Sundays*, and for other purposes connected therewith." This Act is one of the Code of Liquors Acts.

The title of an Act is now to be construed as part of the Act. Lord Lindley, when Master of the Rolls, in delivering the judgment of the Court in *Fielding* v. *Morley* (1), says:—"For some years past the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old law-books we were told not to regard it, but now the title is an important part of the Act, and is so treated in both Houses of Parliament." Marginal notes are no part of the Act, and are not to be regarded in construing the Act; Sir George Jessel, M.R., in *Sutton* v. *Sutton* (2) corrected his former decision on that point. The Act of 1906 in accordance with its title to amend the law as to sale of liquor on Saturday and Sunday, commences section 1 by continuing the Act of 1878 until Parliament otherwise enacts and substitutes the hour of 5 for the hour of 7 o'clock p.m. Section 2 consists of two distinct parts: the first part makes the closing hour on Saturday 9 o'clock p.m. in every town in Ireland except where the population exceeds 5000, and there it is 10 o'clock p.m.; and the second part enacts the penalties for violation of this section by amending the provisions of all the earlier Liquor Acts in regard to penalties or otherwise as if the Saturday closing hour in section 2 of this Act of 1906 were specified in the earlier Acts. The penalties for keeping open on Sunday were already provided by section 2 of the Sunday Closing Act of 1878. Having so dealt with Saturday and Sunday, the Legislature proceeds by a distinct and separate enactment to deal with the mischief of premises like the present keeping open for the sale of liquor at times prohibited by law on Saturday or Sunday in licensed premises where, without distinction or practical separation, other business is lawfully carried on during Sunday and certain hours on Saturday. The enactment is—"Where" (a word wide enough to comprehend any place both on Sunday and Saturday) "any business other than the sale of intoxicating liquors is carried on in the licensed premises" (that exactly describes the present case), "the whole of such premises

(1) [1899] 1 Ch. 1. (2) 22 Ch. D. 573.

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shall be closed at the hours aforesaid, unless the portion of the same in which such sale of intoxicating liquors is carried on is structurally separated from the remainder of the building." *Cohen* v. *South-Eastern Railway Co.* (1) is a direct authority that this position of distinct enactment occurring at the end of section 2 is not confined to the subject-matter to which the previous parts of section 2 relate, and that case has been for more than thirty years an accepted decision on this point. The mischief to be legislated for was the temptation (especially to women) afforded by the place in which (without structural separation) a lawful business or a licensed business might at the same time be carried on during certain times on Saturday and during any time on Sunday contrary to law. The legislation would naturally be commensurate with the mischief according to the ordinary canon of construction of Acts of Parliament. The Liquor Acts are all *in pari materia*, and throughout use the expression "hours" as equivalent to "times," sometimes separately, sometimes with the alternative conjunction "or," and sometimes indiscriminately. The Act of 1860 authorized a licensed person to keep open "at any time" between specified hours. The Licensing Act, 1872, section 78, after specifying prohibited "hours" on Sunday, provides that all Acts relating to the forbidding or authorizing any act or thing "at any times" prohibited shall be construed as if "the times" prohibited were substituted in the earlier Acts for "the times" therein mentioned. The Act of 1878 enacts that all the provisions of any Act whereby the keeping open of any premises for sale of intoxicating liquors is prohibited "during any hours or times" on Sunday are extended to the *whole* of Sunday (except in the five excepted cities), and section 2 extends to the violation of this Act all penalties then in force for keeping open "during any hours or times on Sunday," and this Act of 1906 (2) substitutes in all the earlier Acts of the Liquor Code the prohibited "hours" in the Act of 1906 in place of the "hours" at which these earlier Acts required licensed premises to be closed on Saturday. If the Legislature intended by the expression "hours aforesaid" in the enactment at the end of section 2 to confine the operation of this enactment

(1) 2 Ex. Div. 253, at p. 260. (2) 6 Edw. 7, c. 39.

to Ireland, the Act would have said so plainly; but it has not said so. "Aforesaid" is an ordinary general colloquial expression in common use, and means what is previously mentioned or referred to. The legislation is commensurate with the mischief of places like the present with which it was dealing, and the term "hours aforesaid" is a comprehensive and compendious expression referring to the periods of time prohibited by the Licensing Code, and includes the hours prohibited on Sunday, *i.e.* the whole of Sunday, and the hours prohibited on Saturday, *i.e.* the hours specified in the Act of 1906.

I am, therefore, of opinion that the magistrates were not right in dismissing the summons in this case on the merits.

ANDREWS, J.:—

The particular question to be determined in this case is, whether on the true construction of the Intoxicating Liquors (Ireland) Act, 1906 (6 Edw. 7, c. 39), the clause in its 2nd section with reference to the closing of the whole of licensed premises where any business other than the sale of intoxicating liquors is carried on therein, unless the portion thereof in which the sale of such liquors is carried on is structurally separated from the remainder of the building, applies to Sundays as well as Saturdays.

The Act, as appears from its title, was "to amend the law relating to the sale of intoxicating liquors in Ireland on Saturdays and Sundays, and for other purposes connected therewith."

The only amendment of the law, in so far as Sunday is expressly referred to, is contained in section 1 of the Act, by which the Sunday closing hour of 7 o'clock in the evening, in the places mentioned in section 1 of the Licensing Act of 1878 (41 & 42 Vict. c. 72) is altered to 5 o'clock. Although the 3rd section of the Act of 1906 applies to every day in the week, it does not alter existing closing hours. It merely lengthens the journey which entitles a person residing or lodging within the places referred to to be deemed a *bona fide* traveller. Section 2 of the Act of 1906, down to the clause in question, deals expressly with closing hours on Saturday nights only. It commences by prohibiting the sale or exposure for sale of intoxicating liquors,

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or opening or keeping open any premises for the sale of them on *Saturdays* after the therein specified hours, and proceeds to amend the provisions of every Act relating to such sale or exposure, or opening or keeping open, so as to make them apply as if *these* specified hours were specified therein "as the hours at which licensed premises are required to be closed on *Saturdays*." Then follows immediately the clause in question in these terms—"Where any business other than the sale of intoxicating liquors is carried on in the licensed premises, the whole of such premises shall be closed *at the hours aforesaid*," unless the portion thereof in which the sale of intoxicating liquors is carried on is structurally separated from the remainder of the building. What, then, do the words "at the hours aforesaid" in this clause refer to? The entire of the preceding portion of the section was dealing with Saturdays and closing hours on Saturdays, indicating, as I think, that the mischief aimed at was Saturday evening drinking—the temptation to which, and the opportunity of indulging in which, are, in the majority of cases, much greater then than on other evenings; the words "at the hours aforesaid" ought to receive a natural and reasonable construction, and such a construction would make them apply to the mischief of Saturday evening drinking, and its prevention. If the clause in question is to be applied to Sundays also, it would seem to follow (as I think was admitted during the argument) that it must be applied to every day in the week, with the consequences which would follow. I do not think it would be a natural or reasonable construction of the words "at the hours aforesaid" to make them so applicable, or to give the clause so large an application by words reasonably, and naturally, as I think, bearing a construction which limits their application to what the section was dealing with, namely, Saturday evening closing. I think it is only speculating to say that the intention of the Legislature was to make the clause applicable to closing hours generally on every day in the week. Had this been the intention, nothing could have been easier than to have clearly so expressed it. The enlarged application appears to me to be a forced and unnatural construction which involves a correspondingly large interference with what previously was lawful, and is by no means a necessary application of the

words. We have to determine what the true construction of the Act is, not whether the wider construction would have been preferable. In my opinion the natural and true construction of the words "at the hours aforesaid," having regard to the character of the Act, and the context of the 2nd section, is that "the hours aforesaid" mean the hours previously mentioned for closing on Saturdays, and that the clause is limited to Saturdays. I therefore think that the dismissal of the complaints by the Justices was right.

PALLES, C.B.:—

I have had the advantage of reading the judgment of the Lord Chief Justice, in which he has considered in detail the provisions of this code, and has arrived at the conclusion that the decision of the magistrates was right. I had come to the same conclusion upon an independent consideration of the Act, for the reasons expressed in that judgment, and in that which has been just delivered by Andrews, J. To those reasons I feel that I cannot usefully add anything. There is, however, one matter that I wish to distinctly point out, viz., that upon one subject which looms largely in the judgments of such of my brethren as have arrived at a conclusion opposite to mine, there is no difference between the members of the Court. I refer to the question whether there was evidence that, at the time mentioned in the summons, these licensed premises were open. We all agree that there was. That was decided in *Richardson* v. *Sweeny* (1)—a decision to which I was a party, and by the judgment in which I abide. That, however, does not touch the real matter in controversy here, which is not whether or not the premises were open, but, admitting, as I believe every member of the Court admits, that they were open, whether the time at which they were so open was within the prohibited hours.

LORD O'BRIEN, L.C.J.:—

This is certainly a most important case, and no one can say that it has not received the consideration its importance has demanded.

(1) 42 Ir. L. T. R. 174.

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Does the penultimate paragraph of the 2nd section of The Intoxicating Liquors (Ireland) Act, 1906, which I shall read later on, apply, not merely to Saturday, but to every other day in the week? This is the question which the case stated involved, which was debated at the Bar, and which we have now to decide. Its solution depends on the construction which is to be attached to the 2nd section of the Act to which I have referred—the Act of 1906; we must consider the language of that section, and, if it is not clear in itself, search for any light that may be thrown upon it from any other parts of the Act.

In my opinion, the 2nd section in its entirety is clear in itself; but as other parts of the Act have been referred to, I shall shortly advert to them.

Now, then—are other parts of the Act, outside the 2nd section, helpful? Take the title; it is said that we can derive assistance from it; that to some extent it fortifies, or, at least, tends to support, the extended interpretation.

By "extended interpretation" I mean that method of interpretation which makes the "controverted clause," that is to say, the penultimate clause of section 2, embrace every day in the week. This clause I shall henceforth designate the "controverted clause."

What, then, is the title of the Act—not the title by which it may be cited, but the title which states the objects of the Act? It runs thus: "An Act to amend the Law relating to the Sale of Intoxicating Liquors in Ireland on Saturdays and Sundays, and for other purposes connected therewith."

What do the words—"and for other purposes connected therewith," so often referred to by those who take a view opposed to the ruling of the magistrates, mean? Obviously this, unless you do violence to the English language, "other purposes connected with the sale of drink on the days named, viz., Saturday and Sunday."

Now the contention on behalf of the prosecution is that the "controverted clause" extends to every day in the week—not merely Saturday, but to every other day in the week.

The title of the Act does not support this contention; it militates against it; for it is expressly confined to Saturdays and

Sundays. The word "therewith" applies to purposes connected with the sale of drink on Saturdays and Sundays, and not with the sale of drink generally.

But now I address myself to the 3rd section; and I assume, without deciding it, that this section applies to every day in the week; it is, however, to be remarked that, if it has an extended operation, it is a separate and distinct section, complete in itself. It is not embodied in a section the greater part of which is confined to a limited subject-matter. It bears no analogy to the 2nd section, which, if the extended interpretation is to be accepted, applies in greater part to one subject-matter; and, according to the extended interpretation, to a further and different subject-matter. In fact, it is really an exempting section; it imports into the Act of 1906 the 3rd section of the Sunday Act of 1878 (also an exempting section), with a modification as to distance in the case of persons residing or lodging in the Metropolitan Police District of Dublin, or any of the cities of Waterford, Cork, Limerick, or Belfast; that is to say, the cities excepted by the last clause of the 1st section of the Sunday Act of 1878, from the obligation to be kept closed the whole of Sunday. But, however this may be, the very fact that it is a distinct and separate section suggests that if the Legislature desired to enact a general clause—a clause that would apply to every day in the week—it would do so by a separate and distinct section.

But let me come to the 2nd section of the Act, upon which the controversy really, I might say exclusively, depends; to that section which I think I am justified in calling "the Saturday section."

I proceed altogether independently of the marginal note, which purports to limit the operation of the section to "closing hours on Saturday." The only day that is named in the body of the section is Saturday, and that day is twice named. In fact, it is admitted that, down to and including the word "Saturdays" preceding the "controverted clause," the section is exclusively a "Saturday section"; but here it is said that all limitation ceases, and that the section opens its arms, and, where composite business is carried on, embraces the whole week. To do this the language must be clear. To give a general application to a part of a section

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which, *ex concessis*, as to the greater part of it is confined to a certain limited object, the language must be clear.

It must be borne in mind that every part of the 2nd section, including the "controverted clause," provides for *closing*. The "controverted clause" may provide for something else, but the dominant object is *closing*; and I might say, having regard to the "controverted clause," *effective* closing. The "controverted clause" is ancillary to the closing already provided for. Its object, in my opinion, was to secure that the closing on Saturdays already provided for should not be defeated by the opportunities for frustrating its provisions by two classes of business being carried on in the same part of one set of premises. By the "same part," I mean portions of the premises or building not structurally separated.

Well, then, what is the language of the "controverted clause"? Is it clear? And, if so, how? It is, in my opinion, very clear; its operation is confined to Saturday. Let me read the clause itself:—"Where any business other than the sale of intoxicating liquors is carried on in the licensed premises, the whole of such premises shall be *closed at the hours aforesaid*, unless the portion of the same where the sale of liquor is carried on is structurally separated from the rest of the building." This is the language of the controverted clause; it deals with *closing*; but what was the object of the 2nd section, of which the controverted clause forms part? Plainly this—To protect the workman and his wages at the time he receives them—viz., on Saturday half holiday; or rather, I should say, an idle Saturday afternoon; to protect them for home and family on that day; to provide that the temptation to drink, occasioned by the receipt of his wages on Saturday, should not effect the ruin of the workman, his family, and his home. Now, how was that end to be attained? By an alteration in the hours of closing on Saturdays; by making the hours of closing earlier hours; and by securing, by the "controverted clause," that the object of the section should not be frustrated by any part of the premises being allowed to remain open for any purpose on Saturday. Opportunity, temptation to buy or sell intoxicating liquor on Saturdays, was to be shut out. No matter what the business, the whole of the premises were to

be closed on Saturdays, unless the place where intoxicating liquors were sold was structurally separate from the rest of the building—an obvious and entirely laudable object—in fact, plainly necessary to give effect to the provision as to closing on Saturday; because, if the same premises were allowed to remain open for purposes other than the sale of drink, the provision as to closing in respect of the sale of intoxicating liquors would be easily frustrated. In fact, it would be little more than a dead letter; since detection and conviction would be practically impossible. It would be very easy for an offender to pretend that he or she was engaged solely in business other than the sale or purchase of intoxicating liquors.

I refer again to the language used. We have the "controverted clause" using the words "the hours aforesaid." What are the "hours aforesaid"? Most certainly in their ordinary grammatical signification, they mean "Saturday hours aforesaid"—hours on Saturday and on no other day. In the immediately preceding clause of the same section, the amendment which is directed to be made, and which is made, is expressly limited to Saturday. The words of the section are:—"Shall be amended in this particular, and shall apply as if the said hours respectively were specified therein as the hours at which licensed premises are required to be closed on *Saturdays*." What is the limit of this provision? Is it not, as plainly as the English language can make it, a provision confined to Saturday? Does it not deal exclusively with, and constitute exclusively, Saturday closing hours? It particularizes, so to speak, the amendment, and it expressly declares the limit of its application. This is admitted. But it is said that the next clause takes wing from the previous limited position, and ranges all over the week. It no longer, according to the argument, is confined to Saturday, but ranges over the whole week. This contention, in my opinion, is not only unwarranted by the language used, but it is in direct opposition both to the language used and to the manifest object of the section.

If I were at liberty to look at the marginal note to the second section, the section was concerned exclusively with closing hours on Saturday, and this so-called "controverted clause" deals with

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closing hours. The words are:—"The whole of such premises shall be *closed at such hours aforesaid.*" It deals with closing; with the time of closing; it is a closing clause; this should never be lost sight of—the whole of section 2 is conversant with closing. "The hours aforesaid"—to what do these words grammatically refer? Obviously to the hours which, as plainly as the English language could make them, were hours on Saturday; and to make these words extend to the whole week is, in my opinion, to do an unwarrantable violence to the English language; whereas, reading the "hours aforesaid" as "Saturday hours," makes the whole section consistent; and very intelligently makes the requirement of the "controverted clause" a security for effective closing on Saturdays.

But it is said that the provision as to structural separation causes some difficulty; I fail to appeciate this. What the section says—I fear I am repeating myself—is that the whole of the premises shall be closed at the hours aforesaid, unless the place where intoxicating liquors are sold is structurally separated. What does this mean? In my opinion, that any other business can go on if the intoxicating liquors business is structurally separated from it—that is to say, that the provisions as to closing the whole of the premises shall not apply if there is structural separation of the kind indicated. The object of the "controverted clause" was twofold—to safeguard, to render effectual the early closing as to intoxicating liquors, and not unnecessarily to interfere with matters other than the sale of intoxicating liquors; but the paramount object of the section was early closing as regards the sale of intoxicating liquors on Saturdays, the day upon which it was specially necessary that there should be early closing. If there was a mixed business, then the mixed business became obnoxious to the provisions as to closing; but the section always, in its entirety, remained a Saturday section.

The "controverted clause" was, as it were, the guardian of the main provisions as to closing on Saturday; and if there was no other business carried on, there was no necessity for the guardianship; but if there was another class of business carried on, then the whole of the premises were to be closed unless the spirituous business was carried on in a place structurally separated

from the place where the business of another character was carried on. In my opinion there was no blundering whatever in the language of the section; it said plainly what it intended to say; its object in the "controverted clause" plainly was to safeguard the provision as to closing on Saturdays. To ensure its efficiency, the Legislature, in the most careful, deliberate, and express way, limited the application of the altered hours to Saturdays.

The words are—I repeat them again—they should never be left out of sight—"And shall apply as if the said hours respectively were specified therein as the hours at which licensed premises are required to be closed on Saturdays." And the plain effect of the words "hours aforesaid" was to import into the "controverted clause" the express antecedent limitation, which carefully, expressly, and in the most apt language, prescribed that the hours should be limited to hours on Saturday, and to hours on no other day. Indeed, by making the so-called "controverted clause" refer to every day in the week, you are doing the very thing which Lord Justice Mellish said in *Cohen's Case* (1) he did not do. You are giving the words an ungrammatical and non-natural meaning. We cannot wrest the language from its natural and ordinary meaning, unless we have words which enable us to do so. The language must be sufficiently tractable, sufficiently malleable, to enable us to do so. If the language failed to effect the imputed object, we cannot usurp the functions of the Legislature, and supply words. We cannot legislate. We cannot transcend our province of interpretation; this is elementary. But in my opinion, no question of tractability or of malleability arises. The language of the clause of the section is quite plain, and its object is quite manifest. To read the clause as applying to every day in the week would be a "*tour de force*" of a very marvellous character, for which there is, in my opinion, no sanction whatever in the language used. To do so would be to ignore the language of the "controverted clause," and to disregard the object of the Act.

But now I come to the case of *Cohen* v. *South-Eastern Railway Co.* (1), so much adverted to in the argument. It is said that

(1) 2 Ex. Div. 253.

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a part of a section can apply more generally than an antecedent part of the same section. That may be true; but the extended application depends upon the words used. At p. 260 of the report Mellish, L.J., is reported to have said:—"Then the question is, whether 31 & 32 Vict. c. 199, section 16, includes that provision of the Railway and Canal Traffic Act so as to apply it not only to carriage by railway, but to carriage by steamer. It seems to me that this is a still plainer question, except for the doubt thrown upon it by the Irish case. But the words *are so clear* that there can be no doubt about it—'The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam-vessels and to traffic carried on thereby.' Those words, in their *plain and natural meaning*, incorporate section 7 as well as every other section of the Act." This is the language of Lord Justice Mellish. I emphasize the words "*in their plain and natural meaning.*" This is the *ratio decidendi* of Mellish, L.J., and this reasoning is adopted by Lord Blackburn in *Doolan* v. *The Midland Railway Co.* (1), where he is reported to have said:—"But I think the decision in *Cohen* v. *The South-Eastern Railway Co.* (2) was right; and, *without repeating the reasons given by Mellish, L.J., I refer to them as, in my opinion, fully justifying that judgment.*"

Well, what is admitted in this case? That the words "hours aforesaid," in their *prima facie* natural meaning, deal with Saturdays exclusively. *Cohen's Case* (2) was not a case of extending—of giving to words a meaning other than their *prima facie* natural meaning. It was simply a case of giving effect to the natural meaning of the words. Here the extended application at least modifies and extends the natural meaning of the words. In my opinion, it is directly opposed to the language of the "controverted clause," and runs counter to the plain object of the 2nd section, of which the "controverted clause" forms part.

It is said that the legislation is of a beneficent character, and that in construing the Act we should bear this in mind. But what does all this mean? Does it mean that liberties may be taken with the language used? This so-called "beneficent" rule

(1) 2 A. C. at p. 807. (2) 2 Ex. Div. 253.

of construction, if any such rule exists, is vague and unsatisfactory. It places no limit on the indulgence of idiosyncrasy, and tempts those to legislate whose sole function it is to interpret. The words used ought to be construed in their ordinary, grammatical, and natural sense. If words admit of so doing, if they are sufficiently malleable, they may be read so as to effect the plain, manifest object of an Act of Parliament, obviously inferable from the Act itself; but to say that the object of this Act was to regulate the sale of intoxicating liquors on every day of the week seems to me to be the veriest "*petitio principii*"; indeed, it appears to me more than a "*petitio principii*"—it is, I think, a direct violation of the language of the Act.

I wish also to add that I think the words "in *the* licensed premises" in the controverted clause mean premises with which the section was conversant, viz., premises licensed to sell drink on Saturdays. The words are "*the* licensed premises," not "*any* licensed premises." I now come to the 1st section of the Act of 1906—the Sunday section—it is important, though, in my opinion, it is not necessary to refer to anything outside the 2nd section. However, it appears to me that it never occurred to the Legislature in framing that section that any distinctive commercial business—business other than the sale of intoxicating liquors—was carried on on Sundays. Sunday was a day peculiar in itself. We have been told by an authority we must all revere that the Sabbath Day shall be kept holy. In England and Ireland, at least, no ordinary profane commercial business is transacted; but intoxicating drinks are undoubtedly indulged in. The workman did not receive his wages on Sunday. There was no probability that they would be dissipated before he reached home, wife, and family. There was no real necessity for the application of the "controverted clause" as to Sunday, because no ordinary commercial business was transacted on that day.

It is, however, contended by the prosecution that the "controverted clause" of the 2nd section applies to Sundays. Sunday was distinctively treated in the Licensing Laws; it had an Act for itself, called "The Sunday Act" (41 & 42 Vict. c. 72). The first section of that Act provides that, except in certain specified cities, the whole of Sunday shall be a "closed day"; and the

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2nd section of that Act provides that all penalties shall be enforced so as to be applicable to that Act. That Sunday Act was complete in itself and was applicable exclusively to Sundays. The function of the Act of Edw. 7, the Act of 1906, so far as relates to closing (and the "controverted clause" is a "closing" clause) is contained, in my opinion, in the 1st section exclusively. Provisions as regards Sundays are to be found in the "Sunday Act," except as modified by the Act of Edw. 7; and the extent of that modification, so far as relates to closing, is to be found in section 1 of the Act of Edw. 7, and nowhere else. Sunday legislation was separately and exclusively treated in the Sunday Act of 41 & 42 Vict., and, as to closing, was separately and exclusively dealt with in the 1st section of the Act of Edw. 7.

Sunday received in the 1st section of the Act of 1906 the same separate and exclusive treatment it received in the "Sunday Act" of 41 & 42 Vict.

The 1st section of the Act of Edw. 7, the Act of 1906, clearly defines its application. It continues the Sale of Liquors (Ireland) Act, with the modification as to closing, that the word "five" shall be substituted for "seven"; and makes this to be so, notwithstanding anything in any public or private Act.

It is well to refer to the language of the section; it runs thus: 1. The Sale of Liquors on Sunday (Ireland) Act, 1878, as amended by this Act, shall continue in force until Parliament otherwise enacts; with the modification that, in section 1 thereof, the word "five" shall be substituted for "seven," notwithstanding anything in any public or local Act.

These are the words of the Act; the marginal note is as follows:—"Continuance and Extension of 41 & 42 Vict. c. 72."

This 1st section of the Act of 1906, in my opinion, absolutely concludes the controversy. In the clearest language it says that the "Sunday Act," which contains no provision analogous to the "controverted clause," shall continue in force, modified in one way, and in one way only; that is to say, by the substitution of the figure "5" for the figure "7." It is admitted that if the so-called "controverted clause" does not apply to Sundays, it applies to no other day in the week but Saturday. In my opinion the 1st section, the Sunday section, by its language, shows that it,

so far as the 2nd section is concerned, is complete, exhaustive, and exclusive; that it is, as to closing, to remain untouched and unaffected by anything in the next section, that is, section 2, the Saturday section.

In my opinion section 1 not only does not include any part of section 2, but distinctly excludes every part of that section.

This is my view.

Solicitor for the complainant: *Malachy Kelly.*

Solicitors for the defendant: *Wright & Son.*

J. L.

NICOLLS *v.* CORR AND OTHERS (1).

(1907. No. 7085.)

Practice—Costs—Taxation—R. S. C., I., 1905, *Order LXV, Rule* 65, (41) *and* (42)—*Action which could have been brought in a County Court—Bond in penal sum—Breach—Damages recoverable admittedly under* £50—*Judgment at* Nisi Prius—*Motion to vary as affecting costs—Jurisdiction.*

An action can be brought in the County Court upon a bond conditioned for the payment of a penal sum exceeding £50, provided that the damages claimed for breach of the condition do not exceed that amount.

In an action upon a bond conditioned for the payment of a penal sum of £400, the plaintiff suggested several breaches of the condition, and claimed £400. At the trial the jury found for the plaintiff, and assessed damages at £50. The Judge gave judgment for the plaintiff for £50 with costs, but did not give any certificate, or make any special order under Order LXV, Rule 65, (41) and (42).

Upon motion by the defendant to review the taxation of the plaintiff's costs between party and party:—

Held, by the King's Bench Division (Kenny and Dodd, JJ.; Boyd, J., *dubitante*) and by the Court of Appeal, that the case came within Order LXV, Rule 65, (41) and (42), and that the costs of a third counsel and of instructions (other than instructions to institute proceedings), and of perusals, ought not to be allowed as between party and party.

Held, also, by Madden, J. (the Judge before whom the action was tried),

(1) In the King's Bench Division, before BOYD, KENNY, and DODD, JJ.

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on an application by the plaintiff to vacate the judgment as entered, and in lieu thereof to enter judgment for £400, with an award of the payment of £50 with costs on taxation, that when a judgment at *Nisi Prius* has been passed and entered in the form in which the Judge intended to give, and in fact did give, it, the Judge has no jurisdiction to alter the form of the judgment in such a way as to affect the costs of the action.

THIS action was brought by the plaintiff, Archibald E. J Nicolls, secretary of the Loan Fund Board of Ireland, against Patrick Corr, Terence Gervin, and John M'Cann, upon a bond, dated 9th March, 1901, whereby the defendants became jointly and severally bound to the plaintiff, as secretary of the Loan Fund Board of Ireland, in the sum of £400. The bond recited that the defendant, Patrick Corr, had been duly appointed treasurer of the Coalisland Loan Fund Society, and the condition in the bond was that if the said Patrick Corr should justly and faithfully execute his office of treasurer of the said Society, and faithfully perform the duties of the said office (which duties were specified in the condition in the said bond), then the said bond should be void; but that otherwise it should remain in full force and effect.

The plaintiff, who sued as secretary of the Loan Fund Board of Ireland, by his statement of claim suggested several breaches of the condition in the said bond, and claimed £400 and costs of the action. The defendants denied the breaches of the condition suggested in the statement of claim, and also pleaded certain facts by way of equitable defence.

The action was tried before Madden, J., and a special jury on 23rd and 24th July, at the Londonderry Summer Assizes of 1908. The jury found, in answer to the first three questions put to them, that the defendant, Patrick Corr, had broken the condition in the bond in each of the particulars specified in the said three questions. In answer to the fourth question, the jury found that it was by reason of the breaches specified in the first three questions that the Coalisland Loan Fund Society had suffered damage, and they assessed the damages at £50. The four other questions which were submitted to the jury related to the facts upon which the defendants relied by way of equitable defence to the action. All these questions were answered in favour of the plaintiff. Madden, J., gave judgment for the plaintiff in the sum of £50,

with costs, and certified for discovery and for a special jury for both parties. He also stayed execution until the second day of the ensuing sittings, and in the event of a motion for a new trial or for judgment being served by a defendant on or before that day, until such motion was heard. No such motion was instituted by any of the defendants.

Judgment for the plaintiff for £50, with costs when taxed and ascertained, was passed and entered on 31st October, 1908.

The plaintiff had been represented at the trial by two senior and one junior counsel; and upon the taxation of the plaintiff's costs the defendant, Patrick Corr, objected to the allowance of the costs of more than two counsel, or of the plaintiff's costs of instructions other than instructions to institute proceedings or of perusals, upon the ground that "having regard to the amount recovered," the action could have been brought in the County Court, and that the Judge had not at the trial certified under his hand that more than two counsel were reasonable and proper, nor had he made a special order as to costs of instructions or of perusals. These objections were based on Order LXV, Rule 65, (41) and (42), of the Rules of the Supreme Court (Ireland), 1905. The Taxing Master (Master Goff) ruled in favour of the plaintiff, upon the ground that, having regard to the form of the action, it could not have been brought in the County Court. The defendant, Patrick Corr, then instituted the present motion to review the taxation.

Upon the hearing of this motion it was stated by counsel for the plaintiff that Patrick Corr had been in the employment of the Coalisland Loan Fund Society at the date when the action was tried, and for a short time afterwards. The arguments and judgments in the King's Bench Division proceed upon this assumption.

D. S. Henry, K.C. (*Murnaghan* with him), for the defendant Corr:—

Section 35 of 14 & 15 Viot. c. 57 gives the County Court Judge jurisdiction in "all disputes or differences between party and party for any sum, damages, or penalty, not exceeding £40 (now £50)." These words are wide enough to cover damages for breach of a condition in a bond. In passing this statute the

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Legislature had in contemplation cases where a plaintiff would be penalized in costs if he prosecuted in the High Court an action which could have been brought in the County Court: see sect. 40 (now repealed) of the statute. This section placed a limit on the costs of actions in "debt, covenant, detinue, or assumpsit (save actions for breach of promise of marriage)," if the amount recovered was within the limits therein prescribed. An action on a bond implies a debt, and therefore comes within the terms of both these sections.

Section 40 of 14 & 15 Vict. c. 57 has been replaced by Order LXV., Rule 65, (41) and (42). The test adopted by these sub-rules is not the amount claimed, but the amount recovered: *Solomon* v. *Mulliner* (1).

The plaintiff will contend that this action could not have been brought in the County Court. It is therefore necessary to review the course of legislation dealing with actions of this class. Formerly the practice was that the plaintiff might assign as many breaches as he should think fit, and that the jury should assess damages for as many breaches as were proved by the plaintiff to have been committed: 9 Wm. 3, c. 10, s. 8 (Ir.) (2); *Hardy* v. *Bern* (3). That enactment was repealed—so far as actions in the High Court are concerned—by the Common Law Procedure Amendment Act (Ireland), 1853, and a new procedure was substituted by sect. 146 of the latter statute. This section directs that where the plaintiff succeeds judgment shall be entered for the penal sum named in the bond, with liberty to the plaintiff to issue execution for the damages assessed by the jury for the breaches proved to have been committed, the damages recoverable being limited to the amount of the penal sum; and until that limit is reached the plaintiff can suggest further breaches, and recover damages for them if proved to have been committed. A further change of procedure has been effected by Order XIII, Rule 15, and Order XLII, Rule 9; but neither these Rules, nor the Common Law Procedure Act, 1853, apply to actions in the County Court. The question, therefore, is, could an action such as this have been brought in the County Court after the enactment of the 14 & 15 Vict. c. 57, and prior to

(1) [1901] 1 Q. B. 76. (2) 8 & 9 Wm. 3, c. 11, s. 8 (Eng.). (3) 5 T. R. 636.

the date when the Common Law Procedure Act, 1853, was passed? I submit that it could. Pike's Practical Precedents contains a form of civil bill in an action upon a bond: see also Copinger, Law and Practice of the County Court in Ireland, p. 39. The enactment contained in 9 Wm. 3, c. 10, s. 8 (Ir.) (1), was never made applicable to an action in the County Court.

Pringle (*Horner, K.C.*, with him), for the plaintiff:—

Under Order LXV, Rule 65, (41) and (42), the amount recovered in an action is not the sole test to be applied. If the action could not have been commenced in the County Court, these sub-rules do not apply: *Whitehaven Colliery Co.* v. *M'Kenzie* (2). I contend that this action could not have been brought in the County Court. In such an action the plaintiff must claim the full amount of the penal sum named in the bond: *Tuther* v. *Caralampi* (3); Mayne on Damages, p. 286; Bullen & Leake, p. 135; Roscoe, Nisi Prius, vol. ii, p. 752. "An action on a bond is always in point of form for the recovery of the penalty": Leake on Contracts, p. 772.

Section 8 of 9 Wm. 3, c. 10 (Ir.) (1), is still in force as regards actions in the County Court: Carleton's County Court Practice, p. 499. The words of that section are mandatory, and where it applies the plaintiff must claim the full amount of the penalty.

The judgment in the present case is wrong in form. Judgment should have been given for £400, with liberty to the plaintiff to issue execution for £50: Common Law Procedure Amendment Act (Ireland), 1853, s. 146. The defendant Corr was in the employment of the Coalisland Loan Fund Society when the action was tried, and further breaches of the condition contained in the bond might have been committed by him. If the judgment had been given in the form prescribed by section 146, the plaintiff would have had an appropriate remedy in case further breaches had been committed by Corr. The plaintiff could not have obtained this remedy in the County Court; but the words of Order LXV, Rule 65, (41) and (42), are "having regard to the amount recovered . . . or the relief awarded." Therefore, this

(1) 8 & 9 Wm. 3, c. 11, s. 8 (Eng.). (2) 30 Ir. L. T. R. 164. (3) 21 Q. B. D. 414.

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case should not be regarded as coming within the scope of the rule. Assuming that the plaintiff could have sued in the County Court for damages for breaches committed prior to the date when this action was tried, he would, if he had done so, have been obliged to abandon all further right of action on this bond. He could not have split his cause of action: 14 & 15 Vict. c. 57, s. 36.

[He also cited Foot's Grand Jury Laws, p. 144.]

Murnaghan, in reply:—

The claim in this action comes within the meaning of the word "damages" in 14 & 15 Vict. c. 57, s. 35. If the plaintiff had sued in the County Court, he could have claimed damages for the breaches which 9 Wm. 3, c. 10, s. 8 (Ir.) (1), required to be set forth in the declaration.

The jurisdiction which was conferred on the County Court by 6 & 7 Wm. 4, c. 75, s. 1, has been greatly extended. *The Attorney-General* v. *Wilson* (2) was decided on 6 & 7 Wm. 4, c. 116, s. 168; but the case shows that the practice had been to give a decree for damages actually sustained, and not for the penalty. This practice must have been contemplated by the Legislature when enacting 14 & 15 Vict. c. 57.

May 17.

DODD, J.:—

The plaintiff has recovered, in an action in the High Court, judgment for £50, that being the amount assessed by the jury for breaches of conditions contained in a bond, the bond being for £400. The question is, Could that sum of £50 have been recovered, as regards the amount, in the County Court? If it could have been, the decision of the Taxing Master is erroneous. A civil bill can be brought upon a bond. It was so decided by Johnson, J., in *Keay, Appellant*; *Browner, Respondent* (3); but in that case the sum in the recognizance was £20, within the then limit of the Assistant Barrister's jurisdiction. That does not determine the matter. It determined only that an action for debt on a bond for that amount will lie in the County Court. The fact, however, that such an action does lie gets rid of the argument based upon

(1) 8 & 9 Wm. 3, c. 11, s. 8 (Eng.).

(2) 1 Crawford & Dix, Circuit Cases, 447. (3) *Ibid.* 214.

the procedure in the High Court which has been addressed to us. The hardship of the plaintiff not being able to have a judgment that might stand as security against future breaches would apply in the one case as in the other.

Previous to the statute 9 Wm. 3, c. 10, s. 8, the full amount of a bond given as security for a collateral agreement could have been recovered in a Court of Common Law. Since that Act a plaintiff can only recover the damages which he has actually sustained by the breach or breaches of the conditions in the bond. "Recovered" means effectively recovered. A judgment for the full amount of the bond may still be *entered* in the High Court; and when entered it stands as a security for the amount actually found, or to be found, due. But the amount in the bond is not recovered. Execution must be limited to the amount assessed for damages. This is compulsory. The machinery for working out the remedy is part of the procedure in the High Court. Further breaches may be assigned, and continuing breaches may be made the subject of adjudication. The bond is merged in the judgment; the judgment becomes the security in lieu of the bond; and because the plaintiff cannot get this full relief in the County Court it is contended he cannot sue on a bond in that Court. No doubt, the plaintiff cannot get this remedy in the County Court. But neither can he get it in the case of a bond for a penal amount less than £50; and yet this can be proceeded upon in the County Court. The argument proves too much.

As the only thing a plaintiff can "recover" is the amount of the damages, and as the only thing the County Court Judge can give is the amount of the damages, why should a plaintiff not be at liberty to *recover* these, if they do not exceed £50, in the County Court? The words of the 35th section of the Act of 1851 are wide enough. The County Court Judge has jurisdiction in "all disputes and differences between party and party for *any* sum, *damages*, or penalty, not exceeding £40 (now £50), *in all cases whatsoever*, except . . ." and this is not within the exception.

Mr. Pringle, who argued the case so fully and ably, says this is a penalty. But "penalty" means a penalty that can be recovered as a penalty. This is made clear by the words in the previous Act, of which this is an amendment: 6 & 7 Wm. 4,

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c. 75, s. 1, viz.—"Any penalty imposed, or to be imposed, by any Act of Parliament."

If the penalty in the bond is £500 and the damage £5, according to this contention the plaintiff must proceed in the High Court. It must follow that if a plaintiff sues in the High Court, and recovers £5, or £1, or less, as full damages for all the breaches of the conditions in the bond, he will be entitled to full costs of the action. I think that is a conclusion to be avoided.

I think the words "amount recovered" in the Rule mean the amount which the plaintiff is entitled to get. It has the same meaning in the Act of Wm. 3. Even if the judgment here had been in the usual form, for the full amount of the bond, with execution limited to the damages for the breaches, I should still have held that the "amount recovered" was the amount of the jury's finding, that is, the amount for which execution could lawfully issue; and for the reasons I have given I think a civil bill for those damages could have been brought.

KENNY, J.:—

The point that has been argued on this motion is a somewhat difficult one, and almost of first impression, and I confess to my mind, like that of my brother Dodd, having considerably fluctuated during the discussion.

The plaintiff has recovered by the verdict of a jury a sum of £50 damages in an action on a fidelity bond. There was no certificate for a third counsel given or asked for at the trial, pursuant to Order LXV, Rule 65 (41), nor was any special order of a Court or Judge given under sub-rule 42 of that Rule. The defendant, consequently, applies that the costs of a third counsel at the trial, and of instructions and perusals, be disallowed. If the action could have been brought in the County Court, then, having regard to the amount recovered, the defendant is entitled to carry his motion. The plaintiff contends that, the action being on a bond where the penal sum named exceeds £50, he could not have initiated proceedings in the latter Court, notwithstanding that his judgment is only for £50.

There are two classes of bonds to be considered with regard to the procedure to judgment in the High Court, namely, common

money bonds conditioned for payment of one sum at a fixed time or as a *bona fide* subsisting debt, and bonds to secure by a penalty the performance of an agreement contained in any writing. The bond in question in this action admittedly comes within the latter class. In the case of such bonds the writ could not be specially indorsed under Order III, Rule 6, and therefore summary judgment could not be obtained under Order XIV, Rule 1: *Tuther* v. *Caralampi* (1). The writ in a common money bond could be specially indorsed and summary judgment obtained under the last-mentioned order: *Gerrard* v. *Clowes* (2). The procedure to judgment in cases of bonds other than money bonds is regulated in Ireland by Order XIII, Rule 15, where there is default of appearance. Previously to that General Order the practice was governed by the 145th and 146th sections of the Common Law Procedure Act, 1853. By the 145th section the plaintiff might, in an action on such a bond as the one here, assign one or more breaches; and the 146th section then provided that, in any such action, judgment was to be entered for the *full amount* of the penalty, and the jury or Master was to assess damages in respect of the breach or breaches, and an award and payment of such damages was to follow. Under that procedure it seems to me that in every case, including those in default of appearance, the plaintiff's judgment, when he sued upon the bond, was to be for the full penal sum. The actual damages suffered by him, and assessed by the jury in case of a defence, or by the Master in default cases, was to form the subject-matter of an award, or, in other words, of execution. In Wylie, J.'s, treatise on the Judicature Acts (p. 263), it is stated that the new procedure under Order XIII, Rule 15, is substituted for that under the sections of the Common Law Procedure Act, 1853, to which I have been referring. I think that statement is too wide, inasmuch as the General Order deals only with cases of default in appearing. It apparently does not touch the existing procedure when an appearance has been entered. In such cases a pleading must be delivered, and a plaintiff cannot resort to the summary method of obtaining judgment provided by the General Order.

(1) 21 Q. B. D. 414. (2) [1892] 2 Q. B. 11.

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It being, therefore, clear to me that the General Order does not apply to the present case, and that the procedure is governed by the 145th and 146th sections of the Common Law Procedure Act, 1853, I am of opinion that the proper judgment in the High Court on a bond is one for the full amount of the penalty, with an award of execution for whatever damages could be proved. The latter would be the amount recovered in the action. This apparently would be the result whether the statement of claim was framed for the penalty only without mentioning the condition, or whether it claimed the penalty after setting out the condition and the breach of it. No other judgment would seem to me to be correct in form, having regard to the statute. The plaintiff, possibly through inadvertence, accepted judgment here in a different form, namely, for the damages alone.

I have stated what I conceive to be the practice in the High Court in an action on the bond; but in order to test the right to proceed in the County Court, it is essential to see whether it is obligatory on the plaintiff to sue in every case for the full penalty of the bond, or whether he could sue for damages for breach of the condition. If he sues on the bond in the Superior Courts, he must get judgment for the full amount of the penalty. If he abandoned his right to sue on the bond, I apprehend there is nothing to prevent him bringing his action for damages for breach of the collateral agreement. Forms of action are now abolished. If he could thus abandon his action on the bond, and sue for such damages, why should he not be entitled to do so in the County Court where the decree will combine both judgment and execution for the damages that have theretofore accrued: see *The Attorney-General* v. *Wilson* (1). Here the defendant Corr was treasurer of the Society and was still in their employment when the action was brought, and *non constat* there might be subsequent breaches of the condition of the bond. In the Superior Courts the judgment for the full amount of the penalty would afford opportunity to the plaintiff to move from time to time for an inquiry and execution in respect of a further breach. If he had only got judgment for the actual damages which he had suffered, I see no

(1) 1 Crawford & Dix, Circuit Cases, 447.

reason why he should not commence a fresh action for a subsequent breach. If he could do so, then the proceeding in the Civil-bill Court was open to him, In his action he has recovered, not only by execution but by judgment, a sum for damages which it was within the jurisdiction of the Civil-bill Court to award, and I therefore think that the action was one which might have been brought in the Civil-bill Court, and that the defendant is entitled to succeed in his application.

I think it right to call attention to the language of Order XIII, Rule 15, which enables judgment on a bond to be at once obtained by motion where there has been default of appearance. The judgment in such a case need not be for the full penalty. It is to be only for such sum as shall seem just. The corresponding English Order preserves in its entirety the old procedure of suggestion of breaches, and gives no such summary relief as is contemplated by our General Order.

BOYD, J.:—

Although I have not formed an opinion strong enough to compel me to dissent from the judgments delivered by my brethren, I am unable thoroughly to agree with the reasoning on which they are founded. The question before us is unquestionably one of great doubt and difficulty, and we have all more or less altered our views as the arguments proceeded. I shall now state the reasons which cause me to hesitate in adopting the judgment which has just been delivered.

The action is upon a bond for £400. Now, under 9 Wm. 3, c. 10, s. 8, this action could, no doubt, have been brought in any Court; but, by the Common Law Procedure Act, 1853, s. 146, it is expressly provided that in an action upon a bond conditioned for the payment of a penal sum the jury shall assess the amount of damages for breaches of the condition in the bond, but that judgment shall be entered for the full amount of the bond; and if judgment is entered for the full amount of the bond, it would so far be recovered for that amount. The plaintiff, however, can issue execution only for the damages assessed by the jury: and since the damages in this case were assessed at £50, such amount

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of damages could, if the action were sustainable in the County Court, have been recovered there.

The Rules upon which the defendant wishes us to act are Order LXV, Rule 65, (41) and (42). [His Lordship read the Rules (1), and proceeded.] It is contended that in this case the Taxing Master ought to have allowed the costs of two counsel only, and ought to have disallowed the costs of instructions, other than instructions to institute proceedings, and also of perusals, on the ground that, having regard to the amount recovered, the action could have been brought in the County Court.

Now, the point which impresses me is this: Under the Common Law Procedure Act, 1853, judgment is to be entered for the full penal amount in the bond—that is the first step; and the result is that the bond is merged in the judgment and disappears. After judgment has been entered in that way, the plaintiff is at liberty to issue execution for the amount of damages assessed by the Court or jury, as the case may be; but the judgment stands as security for future breaches. The assessment of damages is not final. There may be subsequent breaches for which damages may be assessed until the penal sum named in the bond is exhausted. Therefore, in cases like the present the effect of our judgment is to deprive the plaintiff of a remedy given him by the Common Law Procedure Act, and to give him instead a judgment for a limited amount, so that he will be forced to bring a separate action for subsequent breaches, as indeed might have happened in the present case, since the person, the due performance of whose duty was secured by the bond, remained in the plaintiff's employment until a date subsequent to that on which judgment was given.

In a note to Order XIII, Rule 15, Mr. Justice Wylie, in his work on the Rules of the Supreme Court (2), refers to the Rule as substituting a new procedure for that prescribed in the Common Law Procedure Act, 1853; but that has reference only to certain special cases, for in the same work the note to Order LXV, Rule 65 (42), states (3)—"Where the action could not have originally been brought in the County Court, this Rule [i.e., Order LXV, Rule 65 (42)] does not apply."

(1) Wylie, pp. 922, 923. (2) *Ibid.* p. 263. (3) *Ibid.* p. 923.

In the case now before us the plaintiff could not have obtained in the County Court the full remedy which is given him by the Common Law Procedure Act. What right have we to say to him, "You should not have proceeded upon your bond, but only on the collateral covenant contained in it"? I think that he had a right to sue on the bond itself, and that we are, in effect, depriving him of that right. That is the difficulty which presses on me; but, as I have said, I do not expressly dissent from the judgment of the Court.

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The plaintiff appealed to the Court of Appeal, and also applied to Madden, J., on the 18th June, for an order that the judgment entered in the action on the 31st October, 1908, should be vacated, and that in lieu thereof judgment should be entered as of the same date for the sum of £400, with an award of the payment of the sum of £50, the damages assessed by the jury, together with costs of suit on taxation, or that the said judgment should be amended as aforesaid.

Madden, J. June 18.

Pending Madden, J.'s, decision on this application the appeal was by consent adjourned.

Horner, K.C., and *Pringle*, for the plaintiff:—

The judgment in this case should have been "for the full amount of the penalty, with an award of the payment of the damages assessed": Common Law Procedure Amendment Act (Ireland), 1853, s. 146. The words of that section are mandatory. It must be assumed that the order was intended to give effect to that enactment.

Where an order made at *Nisi Prius* does not carry into effect the intention of the Judge, the proper course is to apply to the Judge to amend it: *Abbott* v. *Andrews* (1); *Tucker* v. *The New Brunswick Trading Co.* (2).

In a case like the present the Judge has jurisdiction to amend the order: see the judgment of Lord Watson, at p. 560 of *Hatton*

(1) 8 Q. B. D. 648. (2) 44 Ch. D. 249.

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v. *Harris* (1). It that case *In re Swire*; *Mellor* v. *Swire* (2) was cited with approval. At p. 246 of the report of the latter case Lindley, L.J., said:—"There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its records true; and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal." And Bowen, L.J., said:—"An order, as it seems to me, even when passed and entered, may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice."

In the present case the defendants cannot be prejudiced by the amendment asked for. It is true that they have already paid the amount of the judgment; but they would have had to pay that sum in any event, and the amendment will not increase the damages for which they became liable under the judgment.

In *Tucker* v. *The New Brunswick Trading Co.* (3) and in *Doswell* v. *Norton* (4) an order was amended on the ground that it did not express the intention of the Court; and in *Loughery* v. *Swan* (5) an error was corrected after a lapse of several years and the death of one of the parties.

I contend that Order XXVIII, Rule 11, gives jurisdiction to make the amendment; but even if that Order does not apply, the power to make such an amendment is part of the inherent jurisdiction of the Court.

Henry, K.C. (*Muldoon* with him), for the defendant Corr:—

Unless the order does not carry into effect the intention of the Court, there is no jurisdiction to amend it. This is shown by all the cases which have been cited by the other side. In the present case the order follows the judgment which was actually pronounced.

(1) [1892] A. C. 547.
(2) 30 Ch. D. 239.
(3) 44 Ch. D. 249.
(4) 18 T. L. R. 228.
(5) 23 Ir. L. T. R. 54.

The judgment was not incorrect even in point of form. A similar judgment was given in *The Sligo Guardians* v. *Miller* (1), which was also a case upon taxation of costs, and the form of the judgment was not questioned either in the King's Bench Division or the Court of Appeal.

In *Hatton* v. *Harris* (2) the amendment was made on the ground that the error in the order arose from "a mere slip of the Registrar or Registrar's clerk": see the judgment of Lord Macnaghten, at p. 563 of the report.

Order XXVIII, Rule 11, does not apply to a case like the present: *Reade* v. *Kilkenny Corporation* (3).

Patchell, K.C., and *Murnaghan*, for the defendants Gervin and M'Cann, were not called on.

MADDEN, J.:—

This action was brought upon a bond conditional for the payment of a penal sum of £400. The jury assessed the damages for breach of the condition at £50. Counsel for the plaintiff thereupon applied to me for judgment, and I gave judgment for the plaintiff in the sum of £50, with costs when taxed and ascertained.

I express no opinion on the question whether or not, if my attention had been called at the trial to section 146 of the Common Law Procedure (Ireland) Act, 1853, I should have given judgment in that form. The case of *The Sligo Guardians* v. *Miller* (1) seems to support Mr. Henry's view, that the judgment was not incorrect in point of form; but however this may be, I should certainly, if I had been asked so to do, have safeguarded the plaintiff in the matter of costs; if not by giving judgment in a different form, by giving the certificate required by Order LXV, Rule 65, sub-rules 41 and 42, having regard to the character of the action.

I am now asked to vary the form of the judgment in such a manner as to affect the costs of the action. I am of opinion that I have no jurisdiction to do so. The law upon this point is clear. The object of Order XXVIII, Rule 11, is to provide for the cor-

(1) 2 New Ir. Jur. 119; 3 New Ir. Jur. R. 203.
(2) [1892] A. C. 547. (3) 1 New Ir. Jur. R. 81.

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rection of accidental slips, not in the judgment of the Court, but in the order drawn up for the purpose of giving expression to the judgment. The decision in *Hatton* v. *Harris* (1) is based on the assumption that the error in the order arose through a mistake on the part of the Registrar.

In the present case there was no mistake on the part of my Registrar. His certificate, upon which the order was founded, represents the judgment which I gave, and which I intended to give.

When a judgment is wrong in point of law, the party aggrieved has his remedy by way of appeal, or by motion to set it aside; but the General Order referred to has no application in such a case.

J. C. W.

Appeal. June 21.

Horner, K.C., and *Pringle*, for the appellant (2):—

Sections 145 and 146 of the Common Law Procedure Act, 1853, govern the procedure in this country in actions on bonds for a penal sum. Under section 146 judgment is to be entered for the full amount of the penalty; and although if a less sum be assessed as damages for the breach, execution as to any further amount may be stayed on payment of the amount assessed as damages and costs, yet the judgment for the full amount of the penalty is to stand as a security to the plaintiff against any damages sustained by him for any further breach. How could a civil bill be framed to give a plaintiff in a County Court the full measure of his right under section 146, where the penalty exceeds £50? and what is there in the Judicature Rules to compel him to abandon any portion of his claim at the peril of losing costs properly incurred, and which the Taxing Master was prepared to allow? Concededly the County Court Judge could not give a decree for the full amount of the penalty. He could not award the full measure of relief to which the plaintiff, under the Common

(1) [1892] A. C. 547.

(2) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES FITZGIBBON and HOLMES.

Law Procedure Act, 1853, was entitled. Therefore, the case cannot fall within Order LXV, Rule 65 (41), (42). Even if it literally did, the omission to apply for a certificate or special order was a slip, as to which the judgment could be amended under Order XXVIII, Rule 11.

As to the practice in suing on bonds, see Mayne on Damages (8th ed.), p. 284; Leake on Contracts (5th ed.), p. 772; Bullen and Leake's Precedents (6th ed.), p. 135. The action is always brought to recover the penalty. The present action could not have been brought in the County Court: 14 & 15 Vict. c. 57, s. 35; County Court Rules, 1890, Order III, 3. The old Act, 9 Wm. 3, c. 10, s. 8 (Ir.), is still applicable in civil-bill proceedings. Section 3 of the Common Law Procedure Act, and schedule A to that statute, only repeal it *quoad* proceedings in the Superior Courts: see judgment of Coleridge, C.J., in *Tuther* v. *Caralampi* (1). As to the practice in England, see Pollock's County Court Practice (6th ed.), p. 72; Rules (1857) 43, 44. Judgment can be only entered for the penalty when it does not exceed the amount over which the Court has jurisdiction.

It was considered necessary to pass a special enactment to bring contracts and recognizances for public works under the Grand Jury Act, not exceeding £100 in amount, within the jurisdiction of the Civil-bill Courts. Where the action could not originally have been brought in the County Court, Order LXV, Rule 65 (42), (43), does not apply: *Whitehaven Colliery Co.* v. *Mackenzie* (2); Wylie's Judicature Act, p. 923.

Henry, K.C., and *Murnaghan*, for the respondent:—

The form of the judgment as passed and entered at the trial was perfectly right: *Guardians of Sligo Union* v. *Miller* (3). At all events, the Judge has refused to alter it, and there is neither certificate nor special order; therefore, Order LXV, Rule 65 (41), (42), unquestionably applies: *Solomon* v. *Mulliner* (4). The Court must attribute to the plaintiff the knowledge, when he brought the action, that he could not recover more than £50, and, consequently,

(1) 21 Q. B. D. 414, at p. 416.
(2) 30 Ir. L. T. R. 164.
(3) 2 New Ir. Jur. 119.
(4) [1901] 1 K. B. 76.

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he proceeded in the High Court at peril of being limited as to costs. Section 35 of the 14 & 15 Vict. c. 57 undoubtedly includes a case like this.

Horner, K.C., in reply.

THE LORD CHANCELLOR:—

We are of opinion that this case must be decided on the words of the Rule, which are plain and clear—"Having regard to the amount, recovered or paid in settlement, or the relief awarded." We must attribute now to the plaintiff when he brought the action the knowledge that all he could recover was £50. Could not that action be brought in the County Court? It could. He could have said—"I am entitled under the bond to recover £50, and I accordingly ask the Court to give me a decree for that amount." Section 35 of the Act of 1851 has been referred to by Dodd, J. It uses very wide words. This case is not like any of those excepted by that section. Going back to the words "recovered or paid," they mean effectively recovered—what a plaintiff gets, or for what he could issue execution. The judgment here was for £50. The party bringing that action in the County Court would abandon nothing. When you read the alternative, "paid in settlement," what does that mean? That might be a £5 note. The alternative, therefore, shows that both stand on the same footing; and the argument of Mr. Horner comes to this, that if only £1 was recovered, or £1 paid in settlement, it would not be necessary to apply to the Judge to exercise his discretion as to allowing a third counsel. No application having been made to the Judge, we think that Mr. Horner's contention cannot be sustained, and we must affirm the judgment of the King's Bench Division.

FITZGIBBON, L. J.:—

Order LXV, Rule 65 (41), provides that the costs, which are the subject of this appeal, shall not be allowed in the case of a plaintiff if, having regard to the amount, recovered or paid in settlement, or the relief awarded, the action could have been

brought in the County Court, unless the Judge, having regard to these three matters, gives his certificate at the trial.

The appellant contends that, though the action for the amount recovered could have been brought in the County Court, the case is not within the Rule, because something else, which was not recovered, might have been awarded by the judgment of the High Court. This argument could not be sustained, if money had been paid in settlement; no other relief than £50 was awarded. The judgment is final: it might, perhaps, have been different, or the certificate might have been given; but, as the case stands, the appeal must fail.

HOLMES, L.J.:—

The argument addressed to us would lead to the conclusion that the judgment of Mr. Justice Madden is void in law; but in that case the plaintiff would not be entitled to recover any costs. I cannot adopt that view. We have a judgment here, and it has not been impeached in the way in which it ought to have been impeached if the plaintiff was dissatisfied with it.

Starting, then, with the judgment for £50, I approach the Rule which, I am of opinion, only applies to cases which could be brought in the County Court, provided not more than £50 was claimed by the civil bill. I think that it does not apply to actions of libel, slander, breach of promise of marriage, or crim. con. But this action might have been brought in the County Court if the damages had been limited to £50. It is an action for damages arising from breach of contract, which seems to me to come within the jurisdiction conferred by the 35th section of the Act of 1851. Therefore, I think, the judgment of the King's Bench Division should be affirmed.

Solicitors for the plaintiff (appellant): *E. & G. Stapleton.*
Solicitor for the defendant Corr (respondent): *James Mullan.*
Solicitor for the other defendants: *John Malone.*

W. G.

Appeal.
1909.
April 26.
May 12.

SMITH AND ANOTHER, APPLICANTS; COUNTY COUNCIL OF TYRONE, RESPONDENTS; OMAGH RURAL DISTRICT COUNCIL, APPELLANTS (1).

Malicious injury—Claim for compensation—Mortgagee not in possession—Premises burned by mortgagor—Conviction for arson—Agent—Information—"Servant having the care of the property"—6 & 7 Wm. 4, c. 116, s. 137.

A, owner in fee of premises on which buildings were erected, mortgaged them to B, since deceased, of whom C and D were executors. Neither B, C, nor D was in possession of the premises prior to the destruction of the buildings. E acted as agent for C and D in effecting an insurance on the premises, and paying the premiums thereon; had communications on their behalf with A as to payment of interest on the mortgage, and acted as their agent in winding up B's estate. A set fire to the buildings in order to fraudulently claim the amount of an insurance which he had effected thereon, and was convicted of the offence. E made the information on which a claim by C and D for compensation for the destruction of the buildings was based:—

Held, that E was not "the servant of C and D, having the care of their property injured" within the 137th section of 6 & 7 Wm. 4, c. 116, and that, therefore, the claim could not be sustained.

Query: Could C and D have sustained the claim on an information sworn by themselves?

CASE STATED by Madden, J., on the hearing of an appeal at the Tyrone Summer Assizes, 1908, from the decision of the County Court Judge, awarding the applicants £250 for criminal injuries to property by the burning of a dwelling-house and offices.

The facts were as follows:—

The applicants, as executors of Andrew Elliott, deceased, were mortgagees of the lands on which the house and premises in question stood. These lands were the property in fee-simple of John M'Hugh. The mortgage was made in 1894 by John M'Hugh to Andrew Elliott, to secure £400 and interest. Andrew Elliott died

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES FITZGIBBON and HOLMES.

on the 22nd October, 1898, and probate of his will was granted to the applicants on the 13th January, 1899.

Up to the 12th January, 1908, the lands and premises were in M'Hugh's possession and occupation. He had been for some time in embarrassed circumstances, and the interest on the mortgage had fallen into arrear. He had attempted unsuccessfully to create a tenancy in the lands in his niece, Catherine Anne M'Hugh, with a view to her purchasing under the Land Acts. The Estates Commissioners rejected her application. On the 5th July, 1907, M'Hugh insured the buildings with the Sun Fire Insurance Co. in the name of his niece for £650, and on the 27th December, 1907, he increased the insurance by insuring the farm stock for £50. He set fire to the premises on the 11th January, 1908, to obtain the amount of the insurance, and was convicted of this offence, and sentenced to twelve months' imprisonment, at the Tyrone Spring Assizes, 1908.

On the 15th January, 1908, an information was sworn by Mr. William A. M'Causland, therein described as "agent" for the mortgagees, who resided in England, on their behalf. It was made without any express instructions from them, but he afterwards informed them of it. Mr. M'Causland claimed to be entitled to make the information under a general authority as agent for the applicants. He was a clerk in the office of Mr. E. V. Hamilton, solicitor, in Omagh, and resided in that town. He had taken out a fire policy and insured the premises for the applicants, and paid the premiums for them, to keep up the insurance effected by them in respect of their interest in the mortgaged premises, and the applicants depended on him solely for the protection of their interest in the premises. He admitted that the Insurance Company were the real claimants. It was admitted that up to the time the premises were burned, the executors of Elliott were never in possession thereof. On the 18th April, 1908, they issued a writ in ejectment, claiming possession, and obtained judgment for possession on the 26th May, 1908, and were put into possession by the sheriff on the 2nd June, 1908.

William Doak, auctioneer, proved the value of the farm without buildings to be £312, and that before the fire he was offered

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£450 for the property at an auction. His valuation of the farm with the buildings as before the fire was £560.

It was also proved that since the death of Andrew Elliott Mr. M'Causland acted in the management and winding-up of his estate, proving debts due to the estate, and collecting and getting in outstanding assets. He also acted as agent for the collection of rents for other property of Mr. Elliott, managed all the property of the applicants in this country, and was paid by a percentage commission, and a yearly sum for looking after property other than land. He had taken proceedings under the authority of the applicants to have M'Hugh's farm sold under the mortgagees' power of sale; but the sale was abortive owing to M'Hugh's opposition.

Madden, J., was of opinion that the decision of the County Court Judge should be affirmed; but, on the application of the Omagh Rural District Council, gave special leave to appeal to the Court of Appeal, and stated the present case accordingly.

The questions for the Court were—

1. On the facts above stated, was William A. M'Causland the servant of the applicants, having the care of the property injured at the time of the fire, within the meaning of section 137 of 6 & 7 Wm. 4, c. 116?

2. Were the applicants entitled to compensation under the provisions of the said Act, 6 & 7 Wm. 4, c. 116?

Ignatius J. O'Brien, K.C. (with him *Andrew Todd, K.C.*, and *Murnaghan*), for the Omagh Rural District Council:—

Mr. M'Causland had no express authority from the applicants to make the information. He certainly was not their servant, nor had he the care of the property within the 137th section of 6 & 7 Wm. 4, c. 116 (Grand Jury Act, 1836). That section expressly provides that the examination on oath, unless given by the applicants, is to be given by their servant or servants who had the care of their property so injured: *Duke of Somerset* v. *Mere* (1);

(1) 6 Dow. & Ry. 247.

Bennett v. *County Council of King's Co.* (1); *Yewens* v. *Noakes* (2); *Commercial Plate Glass Co.* v. *Lord Mayor, &c., of Belfast* (3).

A mortgagee who has not gone into possession (as is the case of the applicants here) has merely a charge on the mortgaged premises: *Heath* v. *Pugh* (4): see judgment of Lord Selborne, pp. 359, 360; *Tarn* v. *Turner* (5): see judgment of Kekewich, J., p. 460. In *Lord Ashtown* v. *County Council of Waterford* (6) Palles, C.B., on the point of subrogation, instanced a case where an Insurance Co. successfully made a claim for malicious burning, which they had to pay under a policy; and pointed out that the claim was made in the name of the owner of the property destroyed, and the examination on oath was made by his servant. Here, if the claim had been made in the name of the owner, M'Hugh, it would have been at once met by the conviction of M'Hugh for being himself the incendiary.

D. S. Henry, K.C., and *Gaussen*, for the applicants:—

Under section 135 of 6 & 7 Wm. 4, c. 116, any person or persons injured by the offences thereinbefore described (and which include the present case) are to serve notice in writing, as therein mentioned, of the injury, and of his or their intention to apply for compensation. The only questions are—1st, Has there been a malicious injury? 2ndly, Is the person claiming a person injured? The claim by an agent is sufficient: *In re Carter* (7). In *Yewens* v. *Noakes* (2) only one servant was examined. In *Bennett* v. *County Council of the King's Co.* (1) there were servants employed by the applicant, and it was contended that the applicant's father was a kind of superior servant of his own son.

THE LORD CHANCELLOR:— May 12.

This is an appeal on a case stated by Mr. Justice Madden in reference to an application for compensation for a malicious injury heard before him at the Tyrone Summer Assizes of 1908. The applicants are the executors of the will of Andrew Elliott.

(1) 42 Ir. L. T. R. 82.
(2) 6 Q. B. D. 530.
(3) 27 Ir. L. T. R. 116.
(4) 6 Q. B. D. 345.
(5) 39 Ch. D. 456.
(6) *Ante*, 125.
(7) 26 Ir. L. T. 504.

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One John M'Hugh was the owner in fee of lands near Omagh, containing 104 acres, together with a house, outoffices, and buildings, subject to a charge to the Board of Works. John M'Hugh, in 1894, mortgaged the lands, and house, &c., to Andrew Elliott, to secure the repayment of £400. Andrew Elliott died on the 22nd October, 1898, and the applicants proved his will. John M'Hugh remained in possession of the lands, and the applicants did not interfere with that possession until after the occurrence constituting the malicious injury.

On the 5th July, 1907, John M'Hugh insured the buildings on the lands with the Sun Fire Insurance Co. for the sum of £650 in the name of his niece, in whom he had previously been endeavouring to create a tenancy in the lands, and on the 27th December, 1907, he insured the farm produce on the lands for £50. On the 12th January, 1908, the premises insured were destroyed by fire, and it was established by the trial and conviction of John M'Hugh that he had himself set fire to the premises, in order to obtain the amount of the insurance.

On the 15th January, 1908, an information was sworn on behalf of the applicants, the mortgagees, by Wm. A. M'Causland, with a view to the claim for compensation. The applicants reside in England. This information, stated to be on behalf of the mortgagees, described M'Causland as making it as agent of the mortgagees. M'Causland claimed to make the information under a general authority as agent. He is clerk to a solicitor in Omagh, and it was proved that he took out a fire policy and insured the premises for the applicants, and paid on their behalf the premiums on the policy effected by them as mortgagees. He had been in communication with M'Hugh prior to 1904, but not since, in respect of interest due on the mortgage. He also acted as agent in the management and winding-up of Andrew Elliott's estate, and managed all the property of the applicants in this country, receiving a percentage commission, and also received an annual sum for looking after other property of theirs. He had taken certain steps on their behalf with a view to a sale of the mortgaged premises, and had instituted a suit in Chancery to raise the sum due by sale, and a primary decree was obtained on the 12th February, 1906, but no receiver was appointed; and prior to the

fire on the 12th January, 1908, they never obtained possession, and the mortgagor was, on the 12th January, 1908, in possession of the premises.

Evidence was given that the value of the farm without the buildings was £312, and with the buildings £560. There were five charges on the premises puisne to that of the applicants. The County Court Judge made a decree for compensation to the amount of £250.

The main contention on behalf of the District Council on the appeal was that M'Causland, who made the information, was not the servant of the applicants, who had care of their property injured, within the meaning of the Act, even if the applicants, as mortgagees, were entitled to make such application. The questions stated by Mr. Justice Madden for us are—(1) On the facts stated, was William A. M'Causland the servant of the applicants, having the care of the property injured at the time of the fire, within the meaning of sect. 137 of 6 & 7 Wm. 4, c. 116? (2) Were the applicants entitled to compensation under the provisions of that statute?

The learned Judge was of opinion that the decision of the County Court Judge should be affirmed; but at the request of the appellants stated this case.

The question depends on the true construction of the adapted section of the Grand Jury Act, as applied to the facts. That section provides that every person applying for compensation shall, within three days, unless prevented by illness or other sufficient cause, give in an examination on oath, or that examination on oath shall be given by his, her, or their servant or servants who had the care of his, her, or their property so injured. There is no doubt that this section makes the information a condition precedent to recovery.

Was, then, M'Causland, on the 12th January, 1908, a servant of the applicants having the care of this property? The applicants were mortgagees not in possession, and M'Causland was their agent, paid as agents are in such cases. John M'Hugh was the mortgagor in possession. He had the possession and care of the property, and a servant of his, if such servant had the care of it, would have fulfilled the provisions of the section. Had M'Causland also the care of it for persons who had neither possession nor care? It is not enough that he should be the servant: he must also have

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the care; and the service, and the possession and care, are all linked together.

I express no opinion as to whether the mortgagees, by reason of the injury to the property, had not a right themselves to make the information; but I do not think their land agent could, under the statute, make it for them, and this is enough to dispose of the case in favour of the appellants.

In the case of *Bennett* v. *County Council of King's Co.* (1) the applicant lived in Meath, and kept horses at his father's place in the King's County. Two grooms, employed, fed, and paid by the applicant, looked after the horses; but the applicant's father, under a voluntary agreement, superintended the management, and he was to report to the son anything necessary. The information was made by the father. The majority of the Court held that, as there was an owner and servants in fact, the father was not competent, and that "servant" should receive its natural sense. In *The Duke of Somerset* v. *The Hundred of Mere* (2), which turned on the Act of 9 Geo. 1, c. 22—in effect the same as our Grand Jury Act—three distinguished Judges expressed the opinion that a steward who had general superintendence was not a servant having care of the property, which consisted of houses, as there were others employed under him who had the actual care. *Carter's Case* (3) arose on the notice, which was one signed by a man named Willoughby on behalf of Carter; and the Lord Chief Baron, on circuit, held it was sufficient. I do not think that case is the same, and in any event it was only the decision of a single Judge on circuit. In the present case the possession and care were in the mortgagor, and I do not think the land agent of the mortgagees out of possession is a servant within the meaning of the Act.

The answer to the first question will be that M'Causland was not the servant of the applicants, having the care of the property within the meaning of the statute; and that being so, the answer to the second question will also be in the negative.

LORDS JUSTICES FITZGIBBON and HOLMES concurred.

Solicitors for the appellants: *Shields & Murnaghan.*

Solicitor for the executors of Andrew Elliott: *E. V. Hamilton.*

W. G.

(1) 42 Ir. L. T. R. 82. (2) 6 Dow. & Ry. 247. (3) 26 Ir. L. T. 504.

CLARKE, APPELLANT; M'GUIRE, RESPONDENT (1).

K. B. Div. 1908. Dec. 2.

Medical Act, 1858 (21 & 22 *Vict. c.* 90), *s.* 40—*Right of member of public to prosecute for offence—Case stated under* 20 & 21 *Vict. c.* 43—*Service on opposite party—Practice.*

Any member of the public may institute proceedings under section 40 of the Medical Act, 1858.

A copy of a case stated by Justices, under 20 & 21 Vict. c. 43, and notice of the appeal, were served on the solicitor who had appeared for the respondent before the Justices. The respondent had disappeared from the country, and every reasonable effort had been made to serve him personally, but without success:—

Held, that the service was sufficient to give the Court jurisdiction to hear the case.

CASE STATED under 20 & 21 Vict. c. 43.

At a Petty Sessions, held at Dungannon, county Tyrone, on the 23rd March, 1908, the respondent was charged on summons, on the complaint of the appellant, a law clerk, that he, on the 16th January, 1908, and on divers other occasions, at Dungannon, in the county of Tyrone, not then being a registered medical practitioner within the meaning of the Medical Act, 1858, and the Medical Act, 1886, and the Acts amending the same, and not being a person recognized by law as a physician, surgeon, licentiate in medicine and surgery, practitioner in medicine, or an apothecary, did unlawfully, wilfully, and falsely pretend to be, and take and use the name, title, addition, and description of, Licentiate of the Royal College of Surgeons in Ireland, Licentiate of the Royal College of Physicians in Edinburgh, Licentiate of the Royal College of Surgeons of England, Licentiate of the Apothecaries' Hall, Dublin; Licentiate in Midwifery, and Licentiate of the Royal College of Physicians, thereby implying that he was registered under the said Medical Acts of 1858 and 1886, and the Acts amending the same, and that he was recognized by law as a

(1) Before PALLES, C.B., and ANDREWS and BOYD, JJ.

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physician and surgeon, licentiate in medicine and surgery, practitioner in medicine, and an apothecary, contrary to the statute 21 & 22 Vict. c. 90.

Upon the summons coming on for hearing, the parties being present, represented by their respective solicitors, the solicitor for the defendant objected to the summons being heard, upon the ground that the complainant was not entitled to prosecute under the Medical Act of 1858, the right to prosecute thereunder being vested solely in the General Council of Medical Education and Registration of the United Kingdom, inasmuch as the penalty to be recovered was payable to the treasurer of such Council. The majority of the magistrates adopted this view, and dismissed the complaint without prejudice, without going into the evidence.

On the 13th April, 1908, the solicitor for the complainant and appellant applied to the magistrates to state and sign a case. This application was made in the presence and hearing of the defendant, and was refused. The complainant's solicitor thereupon informed the magistrates, in the presence and hearing of the defendant, that an order of mandamus would be applied for, requiring them to state and sign such case, and that the complainant would, on obtaining such order, prosecute his appeal against the order dismissing the summons.

On the 5th May, 1908, a conditional order was obtained in the King's Bench Division, and subsequently, on the 11th June, 1908, was made absolute, ordering the magistrates to state a case; and the present case was accordingly stated, to determine whether the Justices were right in point of law in dismissing the summons.

Before the above-mentioned conditional order was made absolute the defendant, as appeared from an affidavit made by the appellant's solicitor, disappeared from Dungannon and the neighbourhood. Every possible effort was made to trace him, but without success, and therefore it was impossible to serve him with the notice of appeal and a copy of the case stated.

On the 25th November, 1908, notice of the appeal and a copy of the case stated were served on the solicitor who had appeared for the defendant before the magistrates.

Pim (with him *Patchell, K.C.*), for the appellant:—

The solicitor who appeared for the defendant before the magistrates has been served with notice of the appeal and a copy of the case stated, and every possible effort has been made to serve the defendant personally. In these circumstances the Court has jurisdiction to hear the case: *Syred* v. *Carruthers* (1); *Woodhouse* v. *Wood* (2); *Massereene* v. *Bellew* (3); *Teddington Urban District Council* v. *Vile* (4) *Foss* v. *Best* (5) is distinguishable: there no one was served.

[PALLES, C.B.: We will hear the case.]

The summons is brought under the Medical Act, 1858 (21 & 22 Vict. c. 90), s. 40. The preamble to that Act shows that the object was the protection of the public: *Davies* v. *Makuna* (6). The offence being one against the public, any member of the public may prosecute: *Cole* v. *Coulton* (7); *Kenealy* v. *O'Keeffe* (8). A number of prosecutions by common informers have taken place in England under the Act, and in none of them was it suggested that the proceedings were wrongly brought: *Ladd* v. *Gould* (9); *Pedgrift* v. *Chevallier* (10); *Ellis* v. *Kelly* (11); *Steel* v. *Ormsby* (12); *Reg.* v. *Ferdinand* (13); *Reg.* v. *Baker* (14). [He also referred to 41 & 42 Vict. c. 33, ss. 3, 4; 49 & 50 Vict. c. 48, s. 26.]

There was no appearance for the respondent.

PALLES, C.B.:—

As to the preliminary question, whether we had jurisdiction to proceed in this application notwithstanding that the copy of the case was not served personally on the defendant here, the two cases cited, viz., *Syred* v. *Carruthers* (1)—a decision of the English Queen's Bench in the time of Lord Campbell, C.J.—and *Lord Massereene's Case* (3)—a decision of this Court—satisfy me that the

(1) E. B. & E. 469.
(2) 23 J. P. 759.
(3) 24 L. R. Ir. 420.
(4) 70 J. P. 381.
(5) *Ibid.* 383.
(6) 29 Ch. D. 596.
(7) 2 E. & E. 695.
(8) [1901] 2 I. R. 39.
(9) 24 J. P. 357.
(10) 6 Jur. (N. S.) 1341.
(11) 6 H. & N. 222.
(12) 10 T. L. R. 135.
(13) 12 T. L. R. 483.
(14) 66 L. T. (N. S.) 416.

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jurisdiction exists. It is not necessary to determine here the extent to which, perhaps, the principles of these decisions may logically be pressed; but one thing seems clear from them, viz., that if the non-service on the defendant is caused by his own act in leaving the country, and if everything that reasonably could be done to serve him personally has been done, actual service effected upon the solicitor who appeared for him at the Sessions is sufficient. If we decided otherwise, we should be acting distinctly contrary to *Lord Massereene's Case* (1), and to the principle in *Carruthers' Case* (2).

That state of facts exists here.

The other question is the simple one, Was the case before the Justices one in which an uninterested person—a common informer—can institute these criminal proceedings?

All the cases on this question have been well brought before us by Mr. Pim, and it is unnecessary to refer to any except one: *Kenealy* v. *O'Keeffe* (3), in which we distinguished—as, indeed, had Lord Selborne himself, in his opinion in *Bradlaugh* v. *Clarke* (4) distinguished—the case of a civil action from that of a criminal prosecution. The right of a plaintiff to proceed in a civil action depends upon his particular interest in the penalty; and when such an interest does not exist in the plaintiff, it follows that a civil proceeding by him will not lie. But the right to institute a prosecution does not rest solely upon pecuniary interest, or upon interest at all. By the common law every man is deemed to have such an interest in the enforcement of a law passed for the benefit of the public generally as to entitle him to prefer his bill of indictment against another for a criminal breach of such a law, although the only judgment appropriate to such an indictment might be, and usually was, one under which he could not obtain any benefit other than such benefit as a private person has in the enforcement and vindication of the law.

In *Kenealy* v. *O'Keeffe* (3), after a review of the cases decided on the right of private individuals to institute criminal prosecutions under statutes conferring on Justices summary jurisdiction,

(1) 24 L. R. Ir. 420.
(2) E. B. & E. 469.
(3) [1901] 2 I. R. 39.
(4) 8 A. C. 354.

we arrived at a conclusion, expressed in the following words (p. 47):—"If, however, upon the true construction of the statute, the offence is one against the public, and not against a particular individual only, then I am of opinion, as well upon principle as upon the authority of *Cole* v. *Coulton* (1), and uniform usage, that the mere circumstance of the entire penalty being appropriated to a person other than the informer does not take the case out of the general rule."

On the true construction of the 40th section of the Medical Act, 1858 (2), it appears to me that its object was, not to benefit medical practitioners, or any class of them, or to prevent unqualified persons from practising, but to benefit the public by preventing persons having no medical qualifications from representing themselves as qualified, and thereby committing frauds upon the public.

The order will be, that the appellant was entitled to prosecute; that, consequently, the Justices were wrong in law in their determination, which will be annulled; and the case must be remitted to the Justices, to proceed therein as to justice shall appertain, having regard to this declaration.

ANDREWS and BOYD, JJ., concurred.

Solicitors for the appellant: *Simmons & Meglaughlin.*

J. G. T.

(1) 2 E. & E. 695. (2) 21 & 22 Vict. c. 90.

K. B. Div. 1909.

June 7.

THE KING (WINDER) *v.* THE JUSTICES OF COUNTY KILDARE (1).

Justices—Public road—Hedges and trees injuring road—Order directing owner of lands to prune—Subsequent order authorizing road contractor to do the acts—Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict. c. 92), section 9.

The scheme of section 9 of the Summary Jurisdiction (Ireland) Act, 1851, is that there shall be, first, an order that the defendant shall comply with the notice served on him by the county surveyor or road contractor; and a second order, if the first be not complied with, that the county surveyor or contractor may do all or any of the acts ordered by the first order. The second order may be less extensive than the first, but it cannot be more extensive.

Semble: Such first order should not contain a provision that the work thereby required to be done is to be completed to the satisfaction of the county surveyor.

CERTIORARI.

Mrs. Jane Winder, the prosecutrix herein, was the owner of a farm in the county Kildare, adjoining a public road. The contractor for the repair of this road, James Keogh, acting under the direction of the county surveyor, served a notice on the prosecutrix, dated the 21st December, 1907, requiring her, in order to prevent inconvenience to the said road by shade, within ten days to cut her hedges, bushes, or branches, "as required and in conformity with Regulations printed on other side." The regulations so printed were at follows:—

"Regulations adopted by the County Council of Kildare as to cutting hedges, bushes, boughs, &c., alongside or projecting over public road.

"(1) Overhanging branches of trees to be cut, so as to allow at least 16 feet head-room underneath for traffic.

"(2) Hedges and bushes to be headed and trimmed close up to face of fences.

(1) Before PALLES, C.B., and WRIGHT, J.

"(3) Hedges injuring road by their shade are to be cut right across on top, so as to be not more than 7 feet high over grass or ground level at base of fence on land side."

On the receipt of this notice the prosecutrix had her hedges cut laterally in such places as they protruded over the public road, so that they no longer so protruded, but did not reduce their height.

On the 4th January, 1908, a summons was issued against the prosecutrix by the road contractor, to appear at Kilcullen Petty Sessions on the hearing of a complaint that she had failed to prune and dress the hedges in question, she having been duly served with notice to do so on the 21st December, 1907. The summons was heard before the Justices at Petty Sessions on the 14th February, 1908, and an order was made on that day to the following effect:—"It having been proved to us that the public road from Kilcullen to Dunlavin is injured by the height of the hedges adjoining such road, on the property of Jane Winder, notice to cut same having been duly served on the 21st day of December, 1907, we hereby make order that the said hedges be pruned to a height of not more than 7 feet high over grass or ground level at base of fence on land side, such work to be completed by March 31st, 1908, to the satisfaction of Mr. Glover, county surveyor; and further order that the defendant pay the sum of two shillings for costs, and, in default of payment of said costs, to be levied by distress of defendant's goods and chattels."

The prosecutrix did not comply with this order, and, on the 4th January, 1909, a summons was issued against her by the road contractor to appear at Kilcullen Petty Sessions on the hearing of a complaint that she had failed to prune and dress the hedges, for the cutting of which an order was made on her on the 14th February, 1908, at Kilcullen Petty Sessions, which she had disobeyed, to the further injury of the public road therein mentioned. This summons was heard before the Justices at Petty Sessions on the 12th February, 1909, and an order was made on that day to the following effect:—"The Court having inquired into the complaint, and it appearing that the defendant has not complied with the notice served on her by the complainant nor with the order of

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this Court, dated the 14th February, 1908, hereby orders and directs that the complainant forthwith do all the acts required to be done by the defendant, as mentioned in the said notice, and to cut and plash all such hedges, and to prune and lop all such trees of the defendant as are causing injury to the said road, and that the defendant do pay to complainant the sum of twenty shillings costs, and, in default of payment, the amount to be levied by distress warrant."

On the 25th February, 1909, the prosecutrix obtained a conditional order to bring up and quash the last-mentioned order of the 12th February, 1909, on a number of grounds set out in the conditional order. Of these the arguments in the King's Bench Division were directed to the following:—"That no valid order was made upon the said Jane Winder precedent to the order of the 12th February, 1909, the order of the 14th February, 1908, being bad upon its face, inasmuch as—(1) It does not allege or state that the road was or is prejudiced by the shade of any hedges or trees . . . (3) It directs the work to be completed to the satisfaction of the complainant . . . (8) It orders trees to be pruned and lopped, the notice or the previous order having made no mention thereof."

Cause having been shown by James Keogh, the present application was on behalf of the prosecutrix, to make the conditional order absolute notwithstanding cause.

James O'Connor, K.C., and *Figgis*, for the prosecutrix.

Falconer, K.C., and *Dudley White*, for James Keogh.

PALLES, C.B.:—

Neither of us has any doubt that the second order cannot stand. A number of objections have been opened by Mr. O'Connor. I do not wish to say that any of them are not substantial, and may not ultimately prove to be good; but for the purposes of my present judgment I confine myself to one. The ground upon which I hold the second order bad is that it is more extensive than the first one. The scheme of the section under which these orders are made (section 9 of the Summary Jurisdiction (Ireland) Act, 1851)

is—a first order that the defendant shall comply with the notice served on him by the county surveyor or contractor; and a second order, if the first be not complied with, that the county surveyor or contractor may do all or any of the acts ordered by the first order; that is to say, the second order may be less extensive than the first order, but the object of the second order, as well as the words of the section, show that it cannot be more extensive, because the second order is no more than the substitution of the county surveyor or contractor for the defendant to do the acts which the first order had required the defendant to do, and which he has neglected to do. Mr. Falconer and Mr. White are right, that the words are to do all or any of the acts required; but in the section "required" refers to the first order.

I do not wish to express a judicial opinion on the point; but I am inclined to think that the first order ought not to have contained the provision as to the work being completed to the satisfaction of the county surveyor.

WRIGHT, J., concurred.

Solicitors for the prosecutrix: *Kennedy & Figgis.*
Solicitors for James Keogh: *White & White.*

J. G. T.

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BELL *v.* ARCHBOLD (1).

Land Law (Ireland) Act, 1881, *s.* 21—*Land Law (Ireland) Act*, 1887, *s.* 1—*Covenants consistent with a statutory tenancy.*

A lease, made in 1873, contained the following recital and covenant:—"And whereas the said John Archbold, the lessee, has deposited with the said William Bell, the lessor at the time of the execution hereof, a sum of £200 as security for the due payment of the rent hereby reserved, and the performance of the covenants herein contained, and which it has been agreed shall be allowed to the said John Archbold, his executors, administrators, or assigns (if permitted to assign), in liquidation of the rent of the premises hereby demised last accruing before the determination of the said term, provided the several clauses and covenants in these presents contained shall have been, up to the surrender of the premises hereby demised, faithfully observed and performed, he, the said William Bell, doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said John Archbold, his executors, administrators, and assigns, that he, the said William Bell, his heirs, executors, administrators, and assigns, shall and will pay to, or allow out of the rent hereby covenanted to be paid by, the said John Archbold, his executors, administrators, or assigns, interest during the continuance of this demise upon the sum of £200 at the rate of £5 per cent. per annum from the date of these presents; and at the end of said term, or other sooner determination of this demise, shall and will apply and set off the said sum of £200 in liquidation and discharge of the previous year's rent hereby reserved of the premises hereby demised, provided that the said several clauses and covenants shall have been faithfully observed and performed."

A "fair rent" having subsequently been fixed upon the holding, and there having been a devolution of the interest of both lessor and lessee:—

Held, that the covenant was applicable to the statutory tenancy so created in the holding, and that the tenant was entitled to deduct from the judicial rent payable by him the interest payable to him on the said sum of £200 under the covenant.

NEW TRIAL MOTION.

The action, which was tried before Kenny, J., without a jury on February 12th and 26th, 1907, was brought for the recovery

(1) Before MADDEN, BOYD, and DODD, JJ.

of £160 12*s.* 6*d.* rent up to and including the gale due 1st May, 1906, out of the lands held by the defendant under a lease dated the 27th February, 1873, made to John Archbold for a term of sixty-one years, at the yearly rent of £200. The lease contained a covenant by the lessor to pay the lessee, or to allow him out of his rent, interest at the rate of £5 per cent. on a sum of £200, which had been deposited by the lessee with the lessor as security for the payment of the rent and the performance of the covenants on the part of the lessee contained in the lease; and at the end or other sooner determination of the demise to apply and set off the said sum of £200 in liquidation and discharge of the previous year's rent, provided that the several clauses and conditions contained therein were faithfully performed and observed. By the orders of the Irish Land Commission, dated the 1st March, 1888, and 1st June, 1905, respectively, the rent of £200 was reduced to £145 and £111 successively. By the order of the 1st June, 1905, it was declared that in fixing the fair rent no allowance had been made in respect of the said sum of £200, and that the order was made without prejudice to the rights (if any) of the tenant in respect of the same under the covenants contained in the lease.

To the plaintiff's claim the defendant pleaded, as a set-off, three and a half years' interest on the said sum of £200, amounting to £35, and brought into Court, on a plea of tender (which was admitted), the balance of the plaintiff's claim, viz., £123 12*s.* 6*d.* There was also a plea of set-off of the £200 itself, but this defence was abandoned at the trial.

The plaintiff, a lunatic suing by her committee, was entitled as tenant for life under the will of the lessor, and the defendant was the successor in title of the original lessee.

Prior to November, 1902, plaintiff had allowed the interest on this sum of £200 to be set off against the rent, and all payments of rent made since that date by the defendant without such deduction were so made under protest.

Kenny, J., held that he was bound by the decision in *Nettles* v. *Murphy* (1) to hold that defendant was not entitled to set off this interest, and accordingly gave judgment for the plaintiff.

(1) 30 L. R. Ir. 564.

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R. F. Harrison, K.C., and *W. H. Brown*, for the defendant.

Denis Henry, K.C., and *H. M. Thompson*, for the plaintiff:—

The covenant to allow interest on the £200 is merely collateral, and does not run with the land so as to bind an assignee of the landlord's estate. It is not an incident of the holding; for if it was, the Land Commission would have taken it into consideration when fixing a fair rent, and the contract to allow this interest out of the rent reserved by the lease does not extend to the new and substituted rent now payable.

The judgment of the Court was delivered by—

May 15.

MADDEN, J.:—

In leases executed before the passing of the Land Law Act of 1881 a provision is not infrequently found under which the lessee deposits a sum of money in the hands of the lessor, the distribution of which is, in each case, determined by the terms of the particular instrument. In some cases it was stipulated that the deposit should remain as a security, generally, for the payment of the rent and the performance of the covenants contained in the lease. In others it was to be appropriated in payment of the rent accruing due during a particular part of the term, usually the last year. But in all these cases a common element is found. The contract relates to a term of years created by the lease, and the destination of the deposit is fixed at the expiration of the term, and by the contract embodied in the lease. All these contracts were entered into in a state of the law under which the relation of landlord and tenant terminated for all purposes with the term of the demise.

It was inevitable that difficulties should arise in applying contracts of this kind to the statutory tenancies created by subsequent legislation. Under the Land Act of 1881 the contractual term was allowed to run its course; but, on its expiration, tenants satisfying certain statutory requirements were "to be deemed to be tenants of present ordinary tenancies from year to year, at the rents and subject to the conditions of their leases, respectively, so far as such conditions are applicable to tenancies

from year to year." Under this statute the conditions on which the deposit was held could not come into question until after the expiration of the contractual term, when a question would arise in each case whether the conditions of the lease as to the deposit were applicable to the statutory tenancy from year to year. But after the passing of the Land Law Act of 1887 it was possible for this question to arise, as it does in the present case, before the expiration, by effluxion of time, of the term of the original demise. A lessee availing himself of the 1st section of that statute is deemed to be a tenant of a present tenancy, in like manner and subject to like conditions and subject to the same right of resumption as if his lease had expired, and it is enacted that "his holding shall be subject to all the provisions of the said Act of 1881 with regard to present tenancies, as if the tenancy therein was a tenancy from year to year." It has been decided by this Court in *Carrickfergus Urban District Council* v. *Martin* (1) that, when a statutory yearly tenancy has been created under this statute, the lease, as between lessor and lessee, must be taken to have expired, from which it follows that the covenants and conditions in the lease cease to have any contractual operation, and continue to operate, if at all, only so far as they are imported into the statutory tenancy by the provisions which I have quoted from the 21st section contained in the Act of 1881, incorporated by reference in the Act of 1887.

There are therefore, in the present case, as in all cases of the kind, three questions for consideration. First, the construction and effect of the covenant in the particular lease in question; secondly, whether it is a condition applicable to a tenancy from year to year, and therefore a condition imported into the statutory tenancy; and, thirdly, on the assumption that it is not so applicable, the destination of the deposit as regulated by the present principles of law.

The covenant in the lease of the 22nd February, 1873, is clearly expressed. After reciting that the lessee had deposited the sum of £200 as security for the payment of the rent and performance of the covenants in the lease, which sum was to be

(1) [1906] 2 I. R. 79.

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allowed in liquidation of the rent last accruing before the determination of the term, the covenants being duly performed, the lessor covenanted with the lessee that he would "pay to or allow out of the rent hereby covenanted to be paid by the said John Archbold, his executors, administrators, or assigns, interest during the continuance of this demise upon the said sum of £200 at the rate of £5 per cent. per annum," the covenant providing for the application of the sum deposited to the concluding year's rent, in accordance with the recited agreement.

Inasmuch as there has been a devolution of title as regards both lessor and lessee, it becomes necessary to consider whether this is a covenant running with the land. Does the covenant in question touch and concern the land, in the words of the resolution in *Spencer's Case* (1), in such a way that its benefit or burden is capable of running with it? It certainly does concern the rent issuing out of the land, inasmuch as the amount of rent payable in each year is affected by its provisions. Such a covenant is not, in my opinion, collateral or independent, but intimately connected with the enjoyment of the demised land. I do not see how full effect can be given to such a covenant, unless the burden and benefit of it are to continue throughout the term, notwithstanding changes in the title of lessor and lessee—in other words, unless it be held to be a covenant running with the land.

The next question for our decision is whether the covenant relating to the deposit affected the statutory yearly tenancy which came into existence on the fixing of a judicial rent under the Land Law Act of 1887. It will be observed that the deposit is to be a security for the payment of the rent and the performance of the covenants in the lease, although at the expiration of the term it is to be set off as against the rent then due. The present case differs in this respect from *Borrowes* v. *Delaney* (2). There a sum of £40 was specifically allocated to meet the rent of the last half-year of the term, and not, as pointed out in the judgment of Andrews, J., by way of security generally; and after the expiration of the term it was held that the tenant was entitled to credit for the sum so deposited as against the gale of rent to which it was allocated.

(1) 5 Rep. 16; 1 Smith's L. C. (10th ed.), p. 52. (2) 24 L. R. Ir. 503.

The terms of the covenant in the present case correspond with those in the case which came before the Common Pleas Division in *Bolton* v. *Barry* (1), so far as they constitute a continuing security for the performance of the covenants in the lease. In that case the terms of the lease had expired, and the statutory tenancy had come into existence under the provisions of the 21st section of the Act of 1881. But, as I have already pointed out, the provisions of this section are incorporated by reference in the Act of 1887. The statutory tenant claimed to set off, as against rent, the whole or a part of a sum of £500, which had been deposited on the execution of the lease. Morris, C.J., in delivering the judgment of the majority of the Court, said :—"There is a recital in the lease that the lessee had paid £500 as a security for the payment of the rent and performance of the covenants. An express covenant is then inserted, stating how that sum is to be dealt with. Having regard to the 21st section of the Land Law Act, in my judgment, the deposit of £500 is just as applicable to a tenancy from year to year as to a lease. Section 21 transmutes the tenant into a present tenant, but it does so with all the existing conditions applicable to such transmuted tenure; and the landlord is entitled to hold the £500 as a security against the conditions of the lease."

Unless the provision in the covenant before us with regard to the last year's rent differentiates this case from *Bolton* v. *Barry* (1) —a matter which I shall hereafter consider—this case is a decision binding upon us, establishing that the covenant in the lease of 1873 with regard to the deposit of £200 was applicable to the transmuted tenancy coming into existence under the Act of 1887. This covenant cannot survive as a unilateral obligation, and if the sum of £200 remains as a security to the landlord, he must perform his part of the condition, and either pay £10 a year to the tenant, or allow it out of the rent.

This brings me to the consideration of another question which was raised in this case. Ought the Land Commission, in fixing the fair rent of the holding in 1888 and 1905, to have taken into account the continuing liability of the landlord to pay the tenant a yearly sum of £10? Mr. Justice Meredith refused to take this circumstance into consideration in fixing the rent, and, in my

(1) 12 L. R. Ir. 158.

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opinion, rightly. The agreement as to the deposit, though intimately connected with the rent, and therefore running with the land, is in another sense collateral with the rent of the holding, as that word is understood in regard to the Land Law Acts.

In the case of *O'Connor* v. *Smith* (1) the Court of Appeal had to consider the question—"What is the rent, in its character and incidents, with which the Land Act of 1881 is conversant?" It was there argued that an additional penal rent payable under such covenants was properly described as "rent" in the contract of tenancy, and that the same meaning should be given to the word when used in the statutes. FitzGibbon, L.J., deals thus with this contract (2)—"On full consideration it appears to us impossible to apply the provisions of the statute to a rent such as that payable under the covenant in the present case. Its provisions seem to us to apply only to the rent *reddendum* for the use and occupation of the land, under and in accordance with the terms of the contract of tenancy."

The present is even a stronger case, for the allowance to the tenant is dealt with, not as part of the rent, but as an annual sum of £10 to be allowed out of a different thing, that is to say, the rent of the holding. I cannot regard the decision of this Court in *Nettles* v. *Murphy* (3) as ruling the question under our consideration. There was in that case no deposit of money by way of security, and the only question involved in it related to the rent of the holding. The decision turned upon the effect to be given to a covenant in the lease under which the lessor was bound to make an allowance to the lessee in certain events as against the specific rent reserved by the lease. There is nothing in the Land Acts "to show that the landlord, who only contracted to make the specified allowance out of a yearly rent of £86, is nevertheless bound to make it out of the very different and largely reduced rent of £55. The *vis major* of an Act of Parliament, subsequent to the lease, and put in force by the tenant, has altered the contract between the parties as regards the amount of the rent, but has not imposed on the landlord a new contract, requiring him to make the specified allowance out of a reduced rent which he neither contracted to make it out of, nor, when the lease was made,

(1) 20 L. R. Ir. 393. (2) *Ibid.* 400. (2) 30 L. R. Ir. 564.

contemplated (any more than the tenant did) that he would ever be bound to accept" (*per* Andrews, J., at p. 567). The new rent in this case was a reduced rent; but the reasoning of the learned Judge appears to me to be applicable to a new rent, involving a new contract, irrespective of the amount of the substituted rent.

In the present case there is no suggestion of a new contract. The contract relating to the deposit was contained in the lease of 1873, and the continuing effect of such a contract and its applicability to a yearly tenancy have been established by the decision in *Bolton* v. *Barry* (1), which is, in my opinion, the governing authority as regards the present case.

It remains to consider whether the reference in the covenant to the last year of the extinguished term distinguishes this case from *Bolton* v. *Barry* (1). In my opinion this provision is merely ancillary to the governing part of the contract, by which the deposit is constituted a security, continuing so long as the relation of landlord and tenant should exist, which, under the original contract, could not be beyond the last year of the term. In this way the case before us differs essentially from the case of *Creichton* v. *Cullen* (2), recently decided in this Court, where there was no continuing security, but only an appropriation of the deposit of the rent accruing due in the last year of the term. If, however, I had been compelled to come to the conclusion that the continuing security was inapplicable to a yearly tenancy, an important question would have arisen, as in the case to which I have just referred—whether the tenant would not be entitled to the return of the money deposited, if no longer required as a security under the original contract. In the present case this question does not arise. The figures are not in dispute, and, in my opinion, the defendant, being entitled to be paid or allowed the annual sum claimed by him, is entitled to judgment.

My brother Dodd is engaged elsewhere on judicial business. He has read this judgment, and he authorizes me to say that he is of the same opinion as that which I have expressed, and for the same reasons.

Solicitor for the plaintiff: *Wellington Young.*

Solicitor for the defendant: *R. J. Porter.* R. G. L. L.

(1) 12 L. R. Ir. 158. (2) Unreported.

K. B. Div. 1909. Oct. 27.

THE PROVINCIAL BANK OF IRELAND, LIMITED, *v.* EUGENE PHELAN AND MARY PHELAN (1).

Practice—Judgment in default of appearance—Lapse of a year from service of writ—Notice of intention to proceed—Service of—R. S. C. I. (1905, 22*nd February*), *Ord. LXIV, Rule* 15; *Ord. LXVII, Rule* 5.

Where no appearance has been entered to a writ of summons, endorsed for a liquidated sum, in an action in the King's Bench Division, and a year has elapsed since the service of the writ, filing in the Notice Office a month's notice of intention to proceed with the action does not constitute notice sufficient to entitle the plaintiff to enter final judgment for the amount due.

MOTION for leave to enter final judgment in default of appearance.

The writ of summons was specially endorsed with a claim for £57 4*s.* 3*d.*, balance due for principal and interest by the defendants on foot of a joint and several promissory note for £60, dated 6th February, 1907, made by the defendants respectively and Robert Phelan for value in favour of the plaintiffs, and payable three months after date. The writ averred that the note had been duly presented for payment and dishonoured.

Neither of the defendants appeared to the writ, but between 20th March, 1908, and 19th February, 1909, four sums of £10 each were paid by the defendants upon foot of the said debt. It was stated that since 19th February, 1909, letters demanding payment of the balance of the debt and interest had been written to the defendants, and that no reply from them had been received.

The plaintiffs filed in the notice office a month's notice of intention to proceed, and after a month had elapsed, applied to the officer to enter final judgment for £19 14*s.* 9*d.*, being the amount due for principal and interest down to 14th October, 1909. The officer refused to allow the plaintiffs to enter judgment, upon

(1) Before ANDREWS, BOYD, and WRIGHT, JJ.

the ground that the notice of intention to proceed had not been sufficiently served. The plaintiffs then moved *ex parte* for leave to enter final judgment. The motion was made before Boyd, J., at Chambers, but, as it raised an important question of practice, he adjourned the application into Court.

R. Doyle, for the plaintiffs :—

Where there has been no proceeding in an action for more than a year from the last proceeding had, Ord. LXIV., R. 15, directs that the party who desires to proceed shall give a month's notice to the other party of his intention to proceed; but the rule does not contain any direction that the notice shall be served personally. "Where no appearance has been entered for a party . . . all notices . . . in respect of which personal service is not requisite may be served by filing them with the proper officer": Ord. LXVII., R. 5. Filing a notice of intention to proceed is sufficient to entitle a plaintiff to enter judgment in a case of this kind: *Morison* v. *Telfer* (1). That case was decided by Swinfen-Eady, J., who considered that the point was ruled by the decision in *Jamaica Railway Co.* v. *Colonial Bank* (2).

[He also cited *O'Connor* v. *Hogan* (3).]

ANDREWS, J. :—

We are all agreed that we ought not on this application to depart from the existing practice in cases of this kind. An alteration in the uniform and existing practice in the King's Bench Division ought, in my opinion, only to be made by a Court which all the Judges of the Division have been requested to form, so as to secure a uniformity of practice.

Apart, however, from this consideration we think that the existing practice under Order LXIV., Rule 15, is a desirable one, and should be adhered to. It is peculiarly desirable in the case now before us, because not only has more than a year elapsed since the last proceeding, but payments on account have been made by or on behalf of the defendants, who might wish to explain these transactions, and might possibly be able to show

(1) W. N., 1906, p. 31. (2) [1905] 1 Ch. 677. (3) 10 L. R Ir. 262.

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that they had further reduced their liability. Order LXIV., Rule 15, requires the specified month's notice in a case of this kind to be *given* "to the other party." The invariable practice appears to have been (notwithstanding Order LXVII., Rule 5) not to accept the mere filing of the month's notice with the proper officer as sufficient in cases of this kind, and we shall not change that practice on this *ex parte* application, on which there will be no rule.

BOYD and WRIGHT, JJ., concurred.

Solicitor for the plaintiffs: *John Tweedy.*

J. C. W.

K. B. Div. 1909. Feb. 23. *Appeal.* April 23, 27.

COUNTY COUNCIL OF THE COUNTY OF DONEGAL *v.* LIFE AND HEALTH ASSURANCE ASSOCIATION (1).

(1908. No. 8551.)

Fidelity bond—Basis of contract—Representations in answer to queries—Default of principal—Absence of negligence by employers to which loss could be traced—Guarantors not discharged.

The defendants were sureties under a bond, conditioned for the faithful performance of his duties by a collector of poor-rate employed by the plaintiffs. The rate-collector made default, and in an action upon the bond against the defendants, to recover the amount of the rate-collector's default, the defendants pleaded that, in a proposal forming the basis of the contract embodied in the bond, the plaintiffs had warranted that the course of conduct prescribed by the Public Bodies Order, 1904, Articles 93, 96, 97, and 100, as to the fortnightly auditing of rate-collectors' accounts, would be strictly followed by the plaintiffs; the defendants also pleaded that representations to the same effect had been made by the plaintiffs to the defendants, and that the latter had been thereby induced to execute the bond. At the trial the defendants proved that the plaintiffs had in certain details departed from the course of conduct prescribed by the above-mentioned Articles of the said Order, but they failed to prove that the rate-collector's default was traceable to any act

(1) In the King's Bench Division, before MADDEN, KENNY, and WRIGHT, JJ.

or neglect on the part of the plaintiffs or their officers. At the trial judgment was given for the plaintiffs for the full sum claimed.

On a motion by the defendants for judgment, or for a new trial :—

Held, by the King's Bench Division and by the Court of Appeal, that, as the rate-collector's default was not attributable to any failure on the part of the plaintiffs to carry out the provisions of the said Order, the alleged warranty and representation, even assuming that they had been made by the plaintiffs, afforded no defence to the action.

THIS action was brought upon two joint and several bonds, one dated 5th July, 1907, made between Cormick Cannon and the defendants and the plaintiffs in the sum of £388, and the other of the same date, made between Henry P. M'Laughlin and the defendants and the plaintiffs in the sum of £550 (1). Cannon and M'Laughlin were rate-collectors employed by the plaintiffs to collect poor-rate, and the bonds were conditioned for the due and faithful performance of their duties in that capacity.

At the termination of the financial year ending 31st March, 1908, Cannon made default in the lodgment of poor-rate to the amount of £227 10*s.* 6*d.*, and M'Laughlin made default to the amount of £122 10*s.* The action was brought to recover these two sums.

The material paragraphs of the statement of defence were as follows :—

(7) As a further defence the defendants say in respect of both the alleged bonds that it was agreed between the plaintiffs and the defendants that the answers contained in the proposal dated 10th June, 1907 (2), made by the plaintiffs to the defendants, should be taken as the basis of the contracts between the parties hereto, for the breach of which this action is brought; and in consideration that the defendants should enter into the said guarantee, the plaintiffs warranted that the accurately defined course of conduct set out in the said proposal in connexion with the carrying out and passing of the work to be done by the said Cormick Cannon and Henry P. M'Laughlin, and each of them, as rate-collectors, and the course of conduct on the part of the plaintiffs to be performed

(1) These two bonds were made in the form (Form 55) prescribed in the schedule to the Public Bodies Order, 1904.

(2) See *post*, pp. 704, 705.

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as enacted by the Public Bodies Order, 1904, Article 100, should be strictly carried out, namely, that the said collectors, and each of them, would fortnightly, or whenever the amount in the hands of either of the said collectors exceeded £100, attend at the county office for the examination of his or their books, counterfoils, and accounts, and produce to the duly appointed officer of the County Council particulars of each fortnightly collection, and the lodgment receipts for all moneys collected by them during the preceding fortnight, and that the said collectors, and each of them, would be required to pay into the bank any sum larger than £100 which would be in the hands of either of the said collectors; and it is enacted by the said article that in the event of any default of any of the stipulations aforesaid the plaintiffs should forthwith call upon the collectors so in default for a written explanation of his default; and if such written explanation were not given, or if the said officer deemed it unsatisfactory, or if the collector made default in any particular as aforesaid, on two successive examination days, the plaintiffs should forthwith inform the defendants; but the said warranty was broken by the plaintiffs, and the plaintiffs had ascertained, and it was well known to them by examinations held prior to 11th November, 1907, and 6th February, 1908, at and subsequent to the said respective dates, that the said collectors, and each of them, were defaulters; and the plaintiffs frequently, after the said collectors and each of them had been found defaulters upon a second examination held long prior to 31st March, 1908, warned the said collectors that they and each of them were such defaulters, and after such warning continued them in their employment, and, being such defaulters as aforesaid, extended his and their time beyond that prescribed in the said proposal and enactment within which they were to lodge the amount of their respective defalcations, and the plaintiffs, well knowing that they were such defaulters, permitted the collectors and each of them to accumulate sums amounting to £227 10*s.* 6*d.*, in the possession of Cormick Cannon, and £122 10*s.* in the possession of Henry P. M'Laughlin, contrary to the course of conduct warranted by the plaintiffs, and to the aforesaid enactment; and the defendants were not informed of the said defalcations, or any part thereof, and were thereby deprived of their opportunity of insisting upon the

dismissal of the said collectors, and the defendants say that it was by reason of the said breaches of warranty and non-fulfilment of their stipulated conditions that the said breaches (if any) complained of occurred to the plaintiffs.

(8) As a further and equitable defence to the defendants as sureties to the said collectors and each of them, the defendants say, in respect of both the said bonds, that before entering into the said contracts of guarantee, it was represented by the plaintiffs in a proposal dated 10th June, 1907 (1), that the accurately defined course of conduct set out therein in connexion with the carrying on and passing of the work to be done by the said collectors and each of them, and the course of conduct on the part of the plaintiffs to be performed, as enacted by the Public Bodies Order, 1904, Article 100, would be strictly carried out by the plaintiffs, which course of conduct is particularly set out in paragraph 7 herein; and the defendants, believing in the accuracy of the said representations, and on the faith thereof, entered into the said guarantee, but the plaintiffs, in breach of the said representation and of the said enactment, failed to hold the examinations as stipulated in the said proposal, and to require the production of the books, accounts, and counterfoils, and lodgment-receipts from the collectors and each of them as often as is stipulated in the said proposal, and as required in the said enactment; and the plaintiffs had ascertained, and it was well known to them by an examination held prior to 11th November, 1907, and 6th February, 1908, and subsequent to the said respective dates, that the said collectors and each of them had been found defaulters upon a second examination held long prior to 31st March, 1908; and that prior to, at, and subsequent to the said respective dates, the plaintiffs, with full knowledge that the collectors were defaulters, warned the said collectors, and each of them respectively, prior to, at, and subsequent to the said dates, that they were defaulters as aforesaid, and extended his and their time beyond that represented in the said proposal and enactments for the lodgment of the said moneys; and the plaintiffs knowingly and wittingly from time to time permitted the said collectors, and each of them, and as such defaulters, to accumulate larger

(1) See *post*, pp. 704, 705.

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sums of money than £100 in their hands, and failed to report the collectors or either of them, and to specify the defaults, as they were bound to do, to the defendants, and that, by reason of the matters alleged, the defendants as sureties are released and discharged from all liability (if any) under their suretyship, as and from the date on which the said collectors, or either of them, became defaulters as aforesaid; and the defendants further say that the defalcations (if any) of the said collectors, or either of them, arose from the gross negligence of the plaintiffs in the performance of their several duties; and that, but for the gross negligence of the plaintiffs, the breaches (if any) complained of could not, nor would any of them, have occurred."

The warranty and representations on which the foregoing pleas were based were contained in the following answers in a proposal submitted to the defendants by the plaintiffs' secretary:

7. With respect to the duties and responsibilities of the applicant, please reply as fully as possible to the following questions:—

(*a*) In what capacity or office will the applicant be engaged, and where?	(*a*) Collectors, to collect poor-rates in their different districts, as already assigned by the County Council.
(*b*) In what way will money pass through his hands—by collection, remittance by post; or how?	(*b*) By collection.
(*c*) Is he allowed to pay, out of the cash in his hands, any amounts on your account; and, if so, are these payments previously authorized and subsequently audited by you?	(*c*) No. Not allowed to make such payments.
(*d*) What is the largest sum which he will have in his hands at any one time, and for how long?	(*d*) £100. Collectors' accounts checked fortnightly.
(*e*) Is he required to give printed receipts from a book with counterfoils? If so, how often will the counterfoils be examined and checked?	(*e*) Yes. Counterfoils examined fortnightly.
(*f*) How often will you require him to render an account of cash received, and to pay the same to you?	(*f*) Fortnightly, or whenever amount exceeds £100.

(*g*) Are moneys to be paid into the bank by applicant? If so, how often will the bank-book be inspected and checked? Can the applicant draw on the employer's bank account?	(*g*) Yes. Bank receipt for each lodgment to be furnished to the County Office along with particulars of each fortnight's collection. Collectors have no power to draw on County account.
(*h*) How often will you balance his cash accounts, and how will you check their accuracy? Please explain fully.	(*h*) Accounts examined by duly appointed officers fortnightly. Collectors to lodge amounts collected as *per* official receipts (for rates) issued during each fortnight.
(*i*) Will the balance in his hands, if any, be counted and paid over, or how dealt with?	(*i*) Amount, if any, uncollected towards close of each half-year to be also lodged; but rates declared to be irrecoverable to be subsequently refunded.

The foregoing answers were given by Bernard M'Fadden, secretary of the plaintiffs, who signed the following declaration:—"I declare that the above statements are true, and I agree that these statements, and any further statements referring to this guarantee, signed by me, shall be taken as the basis of the contract between me and the above-named Association."

When returning this proposal to the defendants, the said Bernard M'Fadden stated in a covering letter:—"While endeavouring to answer your queries as fully as the spaces assigned for the purpose would admit, I wish to supplement my replies by reference to those provisions of the Public Bodies Order, 1904, which relate to the collection and lodgment of poor-rate, and to the prescribed form of bond itself."

The action was tried by Johnson, J., in the Michaelmas Sittings in Dublin on 11th, 14th, 15th, and 16th December, 1908. The action was set down to be tried by a special jury; but on 15th December the jury was discharged by consent of the parties, and the action was tried by Johnson, J., without a jury.

At the trial the defendants failed to prove that either Cannon or M'Laughlin had, to the knowledge of the plaintiffs, been in default at any date prior to the last fortnight of the financial year ending 31st March, 1908; but they adduced evidence upon which they relied as tending to show that the manner in which

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the fortnightly examinations of the collectors' accounts were conducted was so lax as to enable the collectors to conceal deficiencies in their accounts. The defendants contended that, by reason of this laxity on the part of the plaintiffs, it was impossible to ascertain the dates at which either of the said collectors first made default. In addition to the evidence on this point (which is discussed in the judgments of Madden, J., and Holmes, L.J.), the defendants relied on the following facts :—

(1) The person appointed to examine Cannon's accounts was one M'Neelis, and the person appointed to examine M'Laughlin's accounts was one Moore. These two persons were appointed orally by the secretary of the plaintiffs to act as his deputies respectively in auditing Cannon's and M'Laughlin's accounts. The defendants relied on the fact that the secretary was not "authorized in writing" by the plaintiffs to make these appointments (see Article 97 of the Public Bodies Order, 1904), and contended that an oral appointment was not in compliance with the terms of the said Order.

(2) It was proved that on several occasions M'Laughlin's accounts were audited by Moore's son, and not by Moore himself.

(3) It was proved that M'Neelis, in auditing Cannon's accounts, instead of entering "his initials in the prescribed space in the said blocks of the collecting-book" (see Article 96 of the Public Bodies Order, 1904), used a rubber stamp for that purpose.

(4) It was proved that the "treasurer's receipts" for all moneys collected by the said collectors up to and including the Saturday preceding the day appointed for the fortnightly audit of their accounts (see Article 93, Clause 4, of the Public Bodies Order, 1904) were not produced by the collectors at the time when their accounts were examined. It was, however, shown that, as the Bank which acted as treasurer for the plaintiffs had not a branch at either of the places where the audits were held, it was impossible for the collectors to have done so, and the evidence showed that the audit was never closed until the receipt was produced by the accounting collector.

Johnson, J., gave judgment for the plaintiffs for the two sums sued for with costs, but stayed execution until the sixth day of

the Hilary Sittings. On 15th January the defendants served a notice of motion to set aside the verdict and judgment of Johnson, J., and to have judgment entered for the defendants, or, in the alternative, for a new trial of the action.

Ignatius J. O'Brien, K.C., *A. Todd, K.C.*, and *Wood*, for the defendants.

Henry, K.C., *Patchell, K.C.*, and *Wylie*, for the plaintiffs.

The arguments were similar to those on the appeal, *infra*, pp. 712–714.

MADDEN, J.:—

The matter at issue in this case resolves itself into a question of fact, upon the answer to which the legal liability of the defendant Association must depend.

The action is brought upon two bonds, by which the defendant Association became liable as surety for the due discharge of the duties of rate-collector by two men named Cannon and M'Laughlin. At the end of the financial year Cannon was in default to the amount of £227 10*s.* 6*d.*, and M'Laughlin to the amount of £122 10*s.* These are the two sums for which the plaintiffs seek to hold the defendant Association liable.

The first question which we have to consider is, How did these defaults occur? During the hearing of the action the course adopted in collecting and lodging poor-rate, when collected, has been made clear. The rate-collector is given a collecting-book, which charges him with the entire amount of the rates which it is his duty to collect. The book consists of blocks, with corresponding receipts, which in each case are filled in with the amounts of rates which are to be collected from the ratepayers resident in the collection district. When any ratepayer pays his rates, the collector detaches the receipt and hands it to the ratepayer; and on the next day appointed for the checking of his accounts the rate-collector must discharge himself of the amount which, as shown by the blocks, represents the receipts which have been detached since the day when his accounts were last checked.

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There has been some controversy as to the manner in which Cannon's and M'Laughlin's accounts were checked, and therefore it is important to see how that duty should have been performed. The duties of a rate-collector in relation to the checking of his accounts are prescribed by article 93, clause 4, of the Public Bodies Order, 1904, which is as follows:—"To remit to or lodge with the treasurer of the Council all moneys collected by him up to and including the Saturday preceding the day appointed for the checking of his accounts, and to take from the said treasurer, and produce to the secretary of the Council, or his deputy, or to the clerk of the Council, as the case may be, a receipt for every such remittance or lodgment; and further, to lodge with the said treasurer within 24 hours (exclusive of Sundays or public holidays) of the checking of his account all moneys found on such examination to have been collected and not lodged, and to furnish the treasurer's receipt for the same forthwith to the secretary or clerk of the Council." Then, as to the examination or checking of the rate-collectors' accounts, article 96 of the same Order contains the following provisions:—"The secretary or clerk of the council shall, once at least in each fortnight, on the day which may be appointed by the Council for the purpose, examine all the books of all the collectors of poor rate in the service of the Council, and ascertain the total amount of rates collected by each such collector since the last examination of such books; he shall likewise examine the treasurer's receipts for all lodgments made by each such collector since the last examination of his accounts"—that is, the receipts which, by article 93, clause 4, the collector is bound to produce. "In examining the said accounts the secretary or clerk shall see that the entries in the blocks of the abstract and report note include all sums in respect of which the corresponding receipts have been detached from the collecting-book since the last examination of such collector's accounts. He shall enter his initials in the prescribed space in the used blocks of the collecting book, shall fill in the particulars required to be filled by him in the collector's report note, shall sign and detach such report note from the block, and shall carry the totals into the balance sheet, which he shall initial, having first filled in the several other columns and inserted the date of examination."

I now proceed to consider the method in which these provisions were carried out by the plaintiffs and their representatives. With regard to this branch of the case, I wish to point out that we must act upon the evidence as we find it, not upon speculation. The course followed appears to have been this: The rate-collector prepared an abstract, as prescribed by article 93, clause 5, of the Public Bodies Order, 1904, and was present at the checking of his accounts. The fact that he was present has been commented on; but, in my opinion, seeing that he was the accounting party, he was properly present. If, during the checking of the account, the rate-collector had been allowed to hold the rate-collector's book (or collecting-book, as it is called in article 93, clause 3), and to read out the amounts in the blocks from which the receipts had been detached, then, I think, there might have been some doubt as to the efficiency of the method adopted; but it appears to me to be clear from the evidence that some one, whom for the present I will call a person representing the secretary of the County Council, held the rate-collector's book, and that the rate-collector had the abstract which he had previously prepared. The person who checked the account read out one by one the amounts entered in the blocks from which receipts had been detached; and the rate-collector was there—as it was necessary that he should be—to read the corresponding entry in the abstract. In my opinion, the evidence does not show that any other method was adopted. If this course were pursued, a sum in moneys numbered would be found due by the rate-collector, which sum should (see article 93, clause 4) be represented by the treasurer's receipt.

One would naturally expect that the amount collected would have been already lodged, and that the receipt for it would be produced at the checking of the account. The cases, however, of *Grove* v. *M'Elhinney* (1) and *R.* (*Wrice*) v. *Monaghan U. D. C.* (2) show that both on principle and on the ground of convenience these articles should be regarded as directory. In the next place, we take judicial notice of the geographical situation and extent of the county, and we must have regard to physical obstacles arising from the fact that the Bank which acted as treasurer for the

(1) 30 L. R. Ir. 53. (2) 38 Ir. L. T. R. 218.

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County Council had not a branch at the place where the accounts were checked, and that this would render it impossible to have the receipt at the commencement of the checking of the accounts.

It has been contended on behalf of the defendant Association that notice should have been given of the fact that the treasurer's receipt was not produced at the checking of the accounts. It is necessary to consider the effect of article 100 of the Public Bodies Order, 1904. It is as follows:—"If any collector of poor-rate fails to attend at the time and place appointed for the examination of his books and accounts, or if he fails to produce all such books or accounts, or fails to produce or furnish lodgment receipts from the treasurer for all moneys collected by him, the secretary or clerk of the Council shall forthwith call on the collector for a written explanation of his default. If such written explanation be not given, or if the secretary or clerk deem it to be unsatisfactory, or if the collector make default in any particular as aforesaid on two successive examination days, the secretary or clerk shall forthwith report the collector, specifying the default or defaults, to the Local Government Board, to the collector's sureties, and to the Council, or the finance committee of the Council."

Now, what is the meaning of the words "time and place" for the examination of a rate-collector's books and accounts? Time must mean a reasonable time, and, if that be so, must include the time necessary to enable the collector to procure and produce the treasurer's receipt, having regard to the geographical circumstances of the locality. During the course of the argument I asked whether there was any evidence that either of the collectors, prior to the last fortnight of the financial year, failed on any occasion to produce the treasurer's receipt, and I understand that there was no such default by either of them. The time allowed to them to do so was not unreasonably long, and the examination of their accounts was not, in the case of either of them, closed until the receipt had been produced. If that be so, it shows that in each case the whole of the deficit must have occurred during the fortnight preceding March 31st, 1908—a period during which a large sum would naturally be collected, as most of the ratepayers would, according to the ordinary habits of mankind, probably postpone payment as long as possible. In each case the default was occa-

sioned either by the non-collection or the non-payment by the collector of the amount which he was bound to produce at the end of the financial year; and that is precisely the default which the bonds were intended to cover.

It was the duty of the County Council to see that proper security was given for the due performance of their rate-collectors' duties. In my opinion, the secretary of the County Council had full authority to procure the execution of these bonds; and I can find no evidence of misrepresentation such as would entitle the defendant Association to equitable relief. The case is really narrowed to the single question, Is there anything in article 100 of the Public Bodies Order, 1904, which, on the evidence, affords a defence to this action?

It seems to me—though it is not necessary for me to decide the question—that the provisions of that article are intended, partly for the protection of ratepayers and partly for the protection of rate-collectors' sureties.

Apart from the point as to the production of the treasurer's receipt, with which I have already dealt, there is no evidence of any default on the part of either Cannon or M'Loughlin of which the defendant Association should have been given notice. On one occasion Cannon failed to attend for the examination of his accounts, and the secretary of the County Council immediately called for and obtained a written explanation, which he accepted as satisfactory. Except in that instance, no default was made by either of these two rate-collectors until the last fortnight in the financial year; and therefore the state of facts necessary to enable the defendant Association to rely on the provisions of article 100 does not exist.

There remains only one other question for our consideration. It was proved that on several occasions the accounts of one of the rate-collectors were checked by a person who was not either formally or informally appointed to act in the matter. Article 97 of the Public Bodies Order, 1904, shows that if the examination of a rate-collector's accounts is done by deputy, such deputy should be appointed by the secretary of the County Council, on being authorized by the Council to do so; but it contains no provision, either directory or mandatory, as to the manner in which the

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appointment should be made. In the present case no loss has been shown to be attributable to any act or default or incompetency on the part of the person who checked the accounts, and therefore this informality affords no answer to the plaintiffs' claim.

The motion must be dismissed with costs.

KENNY and WRIGHT, JJ., concurred.

J. C. W.

Appeal. April 23.

The defendants appealed (1).

Ignatius J. O'Brien, K.C., *Molony, K.C.*, and *Wood*, for the appellants:—

The County Council's reply on the 10th June, 1907, signed by their secretary, to the requisitions of the Association, dated 6th June, 1907, formed the basis of the contract of suretyship. The Council thereby represented that in the collection of rates the Public Bodies Order, 1904, had been complied with, and would in the future be followed. [Counsel referred to Articles 82, 87, 93 (4), 100 (Vanston, Local Government, pp. 1680 to 1686).] We admit that the evidence does not show that any particular sum of money which it is possible to earmark was lost in any particular week. But there was no protection for the Association when the persons who induced the Association to enter into the guarantee failed to carry out what they represented had been their practice, and one which would be adhered to, namely, strict compliance with the requirements of the Order. M'Fadden was the agent of the Council who were bound to procure the bond. It was within the scope of his authority to reply on behalf of his principals to the inquiries made by the Association.

It is inequitable to hold a party bound by a contract entered into through an agent, and at the same time to repudiate the statements made by the agent inducing the contract: *Biggerstaff* v.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES FITZGIBBON and HOLMES.

Rowatt's Wharf, Limited (1); *Fearnley* v. *London Guarantee and Accident Insurance Company* (2); *Guardians of Mansfield Union* v. *Wright* (3). See judgment of Hannen, L.J., p. 688—"Whether, if the overseers had been the plaintiffs, their laches would have been a defence, is a point which we have not, in my opinion, sufficient materials to enable us to decide. It is clear that mere passive negligence on the part of the obligee does not discharge a surety. It is shown, however, by *Watts* v. *Shuttleworth* (4), that a neglect of duty by the employer may, in some circumstances, be set up as a defence; and if the action had been by the overseers, and it was shown that they had neglected a duty imposed on them by statute, I think the principle of that case might have applied." In that case no negligence could be imputed to the Guardians; but there was evidence of negligence and default on the part of the overseers.

Patchell, K.C. (with him *Henry, K.C.*, and *Wylie*), for the respondents:—

The only questions to be decided here arise on the 7th and 8th paragraphs of the statement of defence. M'Fadden made no misrepresentation as to the course of practice. Where is there evidence of non-lodgment in any week until the last? The physical geography of the places shows that the Order must be regarded as directory, not mandatory. Glenties and Carndonogh were the places for checking. The Bank where the lodgment was to be made was at Letterkenny. The mere neglect of a public body to carry out their statutory duty will not absolve guarantors: *Mayor of Durham* v. *Fowler* (5); *Grove* v. *M'Elhinney* (6).

O'Brien, K.C., in reply:—

It is upon Article 100 of the Order that I rely. It is not on the failure of the collector to lodge or to account, but on the failure of the secretary or clerk of the Council to report such

(1) [1896] 2 Ch. 93.
(2) 6 L. R. Ir. 219, 232, 394; 5 App. Cas. 911.
(3) 9 Q. B. D. 683.
(4) 5 H. & N. 235.
(5) 22 Q. B. D. 394.
(6) 30 L. R. Ir. 53.

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defaults, which occurred on two successive examination days, that I contend the Association are entitled to a verdict.

THE LORD CHANCELLOR :—

This was an action by the County Council against the sureties for two rate-collectors, Cannon and M'Laughlin. The suretyship was created by two bonds dated the 5th July, 1907. There is no doubt that at the close of the financial year of 31st March, 1908, there was a default by the collectors to the amount of £227 10*s.* 6*d.* and £122 10*s.*, for which judgment has been given for the plaintiffs in the action tried before Mr. Justice Johnson, without a jury, affirmed by the Divisional Court.

The bonds are absolute and definite, and the liability under them clear, unless displaced by some legal consideration or proved fact, and it seems to me that the question in the case resolves itself into one of fact.

The case of the defendants is set forth in the 7th and 8th defences. The 7th defence relies on an alleged agreement or warranty contained in the answer to a proposal of 10th June, 1907, made by the plaintiffs, and agreed (as alleged) to be the basis of the contract, that the plaintiffs should see to the carrying out of the provisions contained, as regards rate-collectors, in the Public Bodies Order of 1904, and alleges a knowledge by the plaintiffs that the rate-collectors' duties had not been carried out, and a continuance of them in office after such knowledge; and then the defence concludes "and the defendants say that it was by reason of the said breaches of warranty and non-fulfilment of their stipulated conditions, that the said breaches (if any) complained of occurred to the plaintiffs." The 8th is in substance the same, but put forward by way of equitable defence, and it alleges that representations were made of the same effect as those stated in the 7th; and the plaintiffs, with knowledge of the collectors' defaults, negligently failed to enforce the obligations, and gave no notice to defendants, and continued the collectors in office, and thereby equitably discharged the sureties from liability; and it concludes, "and the defendants further say that the defalcations (if any) of the said collectors, or either of them, arose through the gross negligence of the plaintiffs in the performance of their several

duties; and that, but for the gross negligence of the plaintiffs, the breaches (if any) complained of could not, nor would any of them, have occurred." These are carefully drawn defences, and it will be seen that there was no evidence that any loss had occurred from any omission to have performed all the steps provided for in the Public Bodies Order, 1904, especially Articles 93, 96, and 100, to which we were referred at length, and therefore, there was no evidence that the *per quod* with which the defences rightly conclude was proved. This indeed was admitted by Mr. O'Brien. I assume in favour of defendants that there was an agreement made the basis of the contract, that the steps provided for by the Public Bodies Order should be carried out; but this is a contract of indemnity. I think there was a substantial compliance; but at all events, no loss was proved as resulting.

The chief matter relied on was that the receipt of the treasurer for the lodgment was not produced at the checking of the accounts. The Bank was treasurer, and its branch was at Letterkenny, and the accounts were checked many miles away, and it was physically impossible to produce the receipt at the commencement of the checking of the accounts; but the examination of the accounts was kept open, and not closed till the receipt had in fact been produced, and there was a substantial compliance with the Order, and there was no default traceable to omission to strictly comply with any provision in it. We are not justified in speculating, or presuming any loss not proved, and I think Article 100 is not mandatory, but directory only; and the same observation applies to Article 93. There is no injustice done, for all documents, books, blocks, checks, receipts, and all others, were produced, and were in Court here, accessible to both sides; and it was not suggested that any inference of fact could be drawn from them, establishing by way of evidence any loss.

It follows, so far as evidence exists, that the deficit might have occurred during the last fortnight of the financial year, during which large sums would naturally be collected from the ratepayers who had postponed their payments; and the bonds were intended to cover this default.

It was shown that in some instances, a person acted in the checking of the accounts who was not properly, or at all, appointed

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deputy pursuant to Article 97; but it is not shown that such person was incompetent, no loss has been traced to any act or omission of such person, and this circumstance affords no answer to plaintiffs' claim on the bonds.

Many of the grounds of defence relied upon are answered by the decision in *Mayor of Durham's Case* (1), to which Mr. Justice Johnson calls attention in his judgment. Mere negligence or laches on the part of the County Council will not absolve the sureties.

We see no reason to differ in result from Mr. Justice Madden's judgment, and must dismiss the appeal with costs.

FITZGIBBON, L.J.:—

The defendants contend that the stipulation expressed here, that certain answers shall be treated as the basis of the contract, amounts to a contract that the suretyship shall not operate at all, unless the statements in those answers in the minutest details are fulfilled; in short, that a departure from them in any particular will avoid the contract. That is not the law. The loss is not shown to have been caused by any non-compliance by the plaintiffs with the terms of the contract.

HOLMES, L.J.:—

Assuming that Mr. M'Fadden's documents of the 10th June, 1907, and of the following day are incorporated in the bond given by the defendants to the plaintiffs, and that it thus became part of the contract between them, that the plaintiffs would have a fortnightly audit of the rate-collectors' accounts carried out in the manner prescribed by the Public Bodies Order, 1904, I am of opinion that failure to perform this stipulation cannot be relied on as a defence to this action, unless it is shown that the loss arising from the defaults of the rate-collectors was due to such failure, and would have been avoided if the stipulation had been strictly observed. It is not denied that there was a fortnightly audit; but the defendants allege that it did not fulfil, in certain

(1) 22 Q. B. D. 394.

respects, the provisions of the Order of 1904. It is said that the auditors were not appointed as therein provided; but I am satisfied from the evidence that the audits were conducted by competent men, recognized and paid by the defendants as their auditors. It is also said that these auditors, instead of placing their initials and date to the blocks of the receipts in the collectors' books with a pen, used a stamp for this purpose. I am unable to conjecture how this could affect the audit. A more important point is that, by the provisions of the Order, the amount of rates collected in the fortnight for which the accounts were being audited ought, at the time of the audit, to have been lodged with the treasurer, and the receipt of the Bank therefor produced. It is, however, proved that the full money received by the collectors, as ascertained by each audit, was handed to the treasurer within two days after the audit, and that the receipts therefor were produced in the following fortnight. I am satisfied that a careful examination of all the documents submitted to the auditors shows that the sums for which the collectors were bound to account were correctly ascertained down to the last fortnight of the financial year, and duly paid to the treasurer; and that the whole of their defaults arose in the last fortnight. At the end of that fortnight each collector was bound to lodge with the treasurer, not only the rates collected by him therein, but the balance of the rates for the year that remained uncollected in his district. The two collectors with whom this action is conversant have never done this, and did not attend the final audit, when their default was detected. These are the sums sued for in this action; and if my view of the evidence is correct, it is manifest that the default did not arise in any way from the irregularities in the audits that are relied on. For these reasons I am of opinion that the appeal ought to be dismissed.

Solicitors for the plaintiffs: *Wilson & Simms.*
Solicitors for the defendants: *Todd & Mark.*

W. G.

K. B. Div. 1909.

April 21, 22. June 4.

THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND AND HENRY WILLIAMS, SECRETARY, *v.* JOHN MONAGHAN AND JAMES MONAGHAN (1).

By-law—Approval of two Judges of the High Court—Ultra vires—*Unreasonableness—River Shannon—Navigation—Fisheries—Frame or engine*—Ejusdem generis.

The Shannon Navigation Act, 1839 (2 & 3 Vict. c. 61), by its 37th section, enacted that the care and conservancy of the River Shannon shall be vested exclusively in the Commissioners for the execution of the Act; and, by its 56th section, enacted that "it shall and may be lawful for the Commissioners . . . to make such rules, orders, regulations, and by-laws, as to them shall seem meet and proper for regulating the conduct of all officers, &c., and for the well and orderly using and preserving the said River Shannon, . . . and for regulating the passing and re-passing of all ships, . . . and such by-laws, rules, and orders shall be binding upon, and shall be observed by, all persons whatsoever, and shall be sufficient in all Courts of Law and Equity to justify all persons who shall act under the same; provided that such by-laws, rules, and orders be approved of by any two Judges of any of Her Majesty's Superior Courts of Record in Dublin." The powers of the Commissioners appointed for the execution of the Act subsequently became vested in the Commissioners of Public Works in Ireland. On the 9th August, 1865, the Commissioners of Public Works made the following by-law:—"It shall not be lawful for any person or persons, without the sanction of the Commissioners of Public Works in Ireland (such sanction to be signified in writing under the hands of the said Commissioners for that purpose), to place in any part of the River Shannon any frame or engine for catching eels, or any other fish, or for any other purpose, whether such frame or engine be fixed in the soil of said river, or attached to any anchor, or be otherwise supported in its position. And any person offending against this by-law shall forfeit the sum of five pounds for each such offence." On the 10th August, 1865, approval of the foregoing by-law was endorsed thereon by Chief Justice Lefroy and Mr. Justice Hayes.

At Petty Sessions for a district adjoining the Shannon, John M. and James M. were charged in and by a certain summons, for that they, without the sanction of the Commissioners of Public Works in Ireland, signified in writing under the hands of the Commissioners for that purpose, did unlawfully place

(1 Before LORD O'BRIEN, L.C.J., PALLES, C.B., and ANDREWS, JOHNSON, MADDEN, WRIGHT, and DODD, JJ.

in a part of the River Shannon an engine for catching eels, supported in its position with stones attached thereto, contrary to the statute and by-law. The engine used was an eel-line, a mile and a half or three-quarters in length on each side, with stones attached at intervals of 40 yards, and about twelve to twenty hooks between each stone. The line was paid out from a boat, and laid at the bottom of the river. Upon dismissal of the complaint by the Justices, a case was stated for the opinion of the Court:—

Held, by a majority of the Court (Dodd, Wright, Johnson, and Andrews, JJ., and Palles, C.B.), that the by-law was *ultra vires*.

Held, by Madden, J., and Lord O'Brien, L.C.J., that the by-law was *intra vires*.

Held, by Madden and Johnson, JJ., that the contrivance in question was not a frame or engine within the meaning of the by-law.

Held, by Andrews, J., Palles, C.B., and Lord O'Brien, L.C.J., that the contrivance was a frame or engine within the meaning of the by-law.

CASE STATED for the opinion of the Court by the Justices of the County of Tipperary sitting at Lorrha Petty Sessions, on the 5th November, 1908, as to whether they were right in point of law in their determination on a certain summons in which the Commissioners of Public Works in Ireland were complainants, and John Monaghan and James Monaghan, both of Portumna, County Galway, were defendants. The summons was for infringement of the provisions of the statute 2 & 3 Vict. c. 61, and the by-laws made thereunder. By section 37 of the said Act the care and conservancy of the River Shannon were vested exclusively in the Commissioners for the execution of the Act, and by section 56 it was enacted that "it shall and may be lawful for the Commissioners . . . to make such rules, orders, regulations, and by-laws, as to them shall seem meet and proper for regulating the conduct of all officers, &c., and for the well and orderly using and preserving the said River Shannon, . . . and for regulating the passing and repassing of all ships, . . . and such by-laws, rules, and orders shall be binding upon and shall be observed by all persons whatsoever, and shall be sufficient in all Courts of Law or Equity to justify all persons who shall act under the same; provided that such by-laws, rules, and orders be approved of by any two Judges of any of Her Majesty's Supreme Courts of Record in Dublin."

The powers of the Commissioners appointed for the executi[on] of the Act subsequently, by 8 & 9 Vict. c. 86, s. 2, became vest[ed]

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in the Commissioners of Public Works in Ireland. On the 9th August, 1865, the Commissioners of Public Works made the following by-law:—

"It shall not be lawful for any person or persons, without the sanction of the Commissioners of Public Works in Ireland (such sanction to be signified in writing under the hand of the said Commissioners for that purpose), to place in any part of the River Shannon any frame or engine for catching eels or any other fish, or for any other purpose, whether such frame or engine be fixed in the soil of the said river, or attached to any anchor, or be otherwise supported in its position.

"And any person offending against this by-law shall forfeit the sum of five pounds for each such offence.

"Dated at the Office of Public Works, Dublin, this 9th day of August, 1865.

J. G. M'KERLIE,
W. R. LE FANU,
"*Commissioners of Public Works in Ireland.*

"We approve of the foregoing by-law.
"Dated the 10th day of August, 1865.

"THOMAS LEFROY, CH. J. I.,
"E. HAYES, Third Justice, Q.B."

The summons alleged that the defendants on the 2nd July, 1908, at a place in the bed and soil of the River Shannon adjoining the townland of Lahinch, in the county and district aforesaid, without the sanction of the Commissioners of Public Works in Ireland, signified in writing under the hands of said Commissioners for that purpose, did unlawfully place in a part of the River Shannon an engine for catching eels, supported in its position with stones attached thereto contrary to the provisions, &c.

At the hearing of the said complaint the following evidence was given on behalf of the complainants:—

Augustine Myles Keogh produced the original by-law, and deposed that it was signed by J. G. M'Kerlie and W. R. Lefanu, who were two of the Commissioners of Public Works at the time.

F. Dudley Fletcher gave the following evidence:—"I am Engineer for the Shannon, under the Board of Works. At

Portumna Bridge there is a copy of the by-law on a board, raised about 5 feet 6, or 9, inches from the ground. It is in legible characters. I am aware that line-fishing attached to stones has been going on extensively in the Shannon. This by-law has been also placed on boards at other places on the Shannon."

James Gilmore gave the following evidence:—"I am inspector in charge of Division F, under the Limerick Fishery Board. I remember the 2nd July, 1908, about 8 p.m. I identify map marked, where eel-lines were placed by defendants. I saw defendants first about Portumna Bridge, on the eastern side; one was rowing a boat and the other was paying out line. It was an eel-line; stones were attached to lines at intervals of 40 yards, about twelve to twenty hooks between each stone; the smaller intermediate stones were about 1 lb. in weight. Line was attached to stone. About one mile and a half or three-quarters was put down at both sides. Red line on map accurately represents where line was laid. Next morning, at 5 a.m., I went out in my boat. Portion of line was lifted by defendants when I arrived. They took off eels at intervals on hooks; the majority of eels were immature. Monaghan said to me the previous evening in course of conversation—'I suppose you are going to test this case?' I replied—'The matter is in the hands of my authorities.' The end stone was about 4 lb. He added (subject to objection)—'About seven stone of eels were taken.' I counted twenty-two stones on line."

Michael Reilly gave the following evidence:—"I am water bailiff, and was with Gilmore when the lines were lifted, and corroborate his evidence in every respect; and the men who lifted the lines were the two defendants."

The original by-law, the making of which was proved by Mr. Keogh, and the map (1), which was proved by Gilmore, are to be taken as incorporated in this case.

No evidence was given on behalf of the defendants; but it was contended on their behalf (*a*) that the by-law in question was *ultra vires*, (*b*) that it was unreasonable, and (*c*) that the facts proved did not amount to a breach of the by-law, inasmuch as no obstruction had been proved. It was contended by counsel on

(1) See map annexed.

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behalf of the complainants that the by-law was *intra vires* and reasonable, and he relied on the Act 2 & 3 Vict. c. 61, and the various amendments, and cited *Kruse* v. *Johnson* (1). He contended also that it was not necessary to prove obstruction, and that the device that was used by the defendants was an engine within the meaning of the by-law.

Upon the said hearing we (the Justices) were of opinion that the acts proved by the complainants did not amount to an obstruction of the River Shannon on the part of the defendants, and that the contrivance used by the defendants was not an engine within the meaning of the by-law, and accordingly we dismissed the complaint, as aforesaid.

And hereupon the judgment of the Court is required as to whether we, the said Justices, were correct in point of law in our determination as aforesaid, and whether there was evidence to support the above finding, and as to what should be done in the premises.

Given under our hands this 11th day of December, 1908.

SAMUEL J. DEASE, R.M.
J. WILLINGTON.
W. T. TRENCH.

W. J. Johnston (with him *The Solicitor-General* and *Ignatius O'Brien, K.C.*) for the Commissioners of Public Works :—

The by-law provides in effect that every frame or engine proposed to be used by any person in the River Shannon shall first be submitted to the Commissioners for their sanction. There is nothing unreasonable in the provision which would render it *ultra vires*. Under it the Commissioners have a power of preventing the use of any appliance which is calculated to injure the navigation of the Shannon. The use of any appliance by any person without first going to the Commissioners for their sanction, is the offence under the by-law. Having regard to the powers and rights in reference to the Shannon conferred upon the Commissioners by the 2 & 3 Vict. c. 61, there is nothing extravagant or unreasonable in the provision of the by-law. The Court ought

(1) [1898] 2 Q. B. 91.

to be slow to hold that a by-law is void for unreasonableness. The by-law ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it: *Kruse* v. *Johnson* (1).

The appliance used was within the description of "engine" referred to in the by-law. It was a line laid at the bottom of the river for a distance of between a mile and a quarter and a mile and a half. Stones were placed at intervals of 40 yards "supporting" the line in its position, and there were about twenty hooks between each stone. A glance at the map will show what a formidable engine it was and how easily it might interfere with the navigation of the river. The statute provides for the approval of the by-law by two Judges of the High Court, and it contains words that are contained in no other statute as to the validity of the by-law when made. [He referred to *Institute of Chartered Accountants* v. *Lockwood* (2); *Hornsby* v. *Considine* (3); *Allen* v. *Thompson* (4); *Hill* v. *George* (5); *Gentel* v. *Rapps* (6).]

Frank Fitz Gibbon, for respondents:—

The contrivance used here is not an "engine" within the meaning of the by-law. It is not an "engine" *ejusdem generis* with "frame." A by-law made under the statutory power will be construed as a section of an Act. "Other engines for catching eels," though general words, will be limited to such as are of the same kind as "frame."—Maxwell on Statutes, p. 499; *Palmer* v. *Snow* (7). This is a navigation Act, and a by-law made under its authority can only extend to such contrivances as are capable of interfering with the carrying out of the objects of the Act; here the magistrates have found as a fact that the contrivance used is not an obstruction to navigation.

Further, the by-law is *ultra vires* and bad, whether directed

(1) [1898] 2 Q. B. 91.
(2) [1894] A. C. 347.
(3) 17 Ir. C. L. R. 660.
(4) L. R. 5 Q. B. 336.
(5) 44 J. P. 424.
(6) [1902] 1 K. B. 160.
(7) [1900] 1 Q. B. 725.

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against fishing as such, or only against obstructions to navigation. Fishing is not within the scope of the Act, except so far as fishing rights are necessarily injured by any navigation scheme. The proviso in section 44 is merely a saving clause in the interest of existing fishing rights. The word "conservation" in section 56 does not necessarily import "fishing"; it means the conservation of the river for purposes of navigation: section 73 and the preamble of 5 & 6 Wm. 4, c. 67. There is no power to deal by by-law with "obstructions" expressly contained in section 56, and it is unnecessary. Section 38 provides a remedy against persons obstructing the navigation. There is no general power to make by-laws for the purpose of the Act, except so far as is clearly within the four corners of section 56: Lumley on By-laws, p. 16; *The Queen* v. *Mary Wood* (1). Neither is there anything in section 56 which gives power to make by-laws prohibiting the placing of anything in the river which is, "in the opinion of the Commissioners, injurious to navigation." These words in sections 38, 42, 44, cannot be read into section 56. But even if there is power to deal with obstruction by by-law, this by-law is too wide. It extends to "engines" which may, in the opinion of the Commissioners, be not injurious to navigation; it is not necessarily confined to such as are, in their opinion, injurious, and therefore may make that an offence which is no offence under the Act. Further, it requires a written consent before placing an engine in the river, and is therefore in excess of power.

The contention of the other side that the confirmation of the by-law by two Judges of the Superior Courts as required by the statute places the by-law beyond the reach of the Court is untenable. A by-law can only be confirmed if made in accordance with the provisions of section 56; if in excess of the power in section 56, confirmation cannot give validity: Hardcastle on Statutes, p. 269; Lumley on By-laws, pp. 161, 162; *The Queen* v. *Wood* (1). Further, having regard to the object of the Act, as stated in the title and preamble, this by-law is unreasonable if it is capable of including an engine which in no way comes within the scope of the mischief aimed at in the Act and to prevent

(1) 5 E. & B. 49.

which power to make by-laws is given: *Scott* v. *Pillener* (1); *Fielding* v. *Rhyl Improvement Commission* (2). [He also cited *Strictland* v. *Hayes* (3); *Londonderry Harbour Commissioners* v. *Londonderry Bridge Commissioners* (4); *Dick* v. *Badart Frères* (5).]

The Solicitor-General, in reply.

Cur. adv. vult.

June 4.

DODD, J.:—

The questions in this case are two. First, is the by-law of the 10th August, 1865, made by the Commissioners of Public Works in Ireland, and approved of by the then Lord Chief Justice of Ireland, the Right Honourable Thomas Lefroy, and Mr. Justice Hayes, a good and valid by-law? And the second question is, Was the contrivance resorted to in this case an engine within the meaning of that by-law? The by-law is as follows:— [His Lordship read the by-law].

The Solicitor-General pressed upon us that the judicial sanction given to this by-law is such as to make it beyond review by us. This at least can be urged with much force, that the signatures of the two eminent Judges were not given till the Judges had carefully weighed the matter. My experience of this case has impressed upon me that the view of a Judge may be modified by argument, affected by discussion, and altered by consideration; and though these two eminent Judges had ripe judgment and great judicial carefulness, it is possible their views might have changed on hearing the matter argued. I do not think that the approval of the Judges gave the by-law, as is contended, the force of a legislative enactment, as in the case cited. I content myself with giving the result of my consideration on this part of the case. I am aware the matter will be fully gone into in other judgments. But the signatures of the two Judges raise a presumption that the by-law is valid. It is possible to read into the by-law such words from the Act itself, as being implied, would make it a good navigation by-law. The word "engine" in the by-law, "any

(1) [1904] 2 K. B. 855.
(2) 3 C. P. D. 272.
(3) [1896] 1 Q. B. 290.
(4) [1894] 2 I. R. 384.
(5) 10 Q. B. D. 387.

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Dodd, J.

frame or engine," might be interpreted to mean any engine of the same character as a "frame," and what a frame is we gather from the description of a frame in *Hornsby* v. *Considine* (1). This would make the by-law good, but would justify the magistrates in their finding that the structure in this case was not an engine within the meaning of the by-law.

But it may be said that this is not merely a navigation by-law. The Commissioners are also fishery proprietors. They can let their fisheries. Have they not power then to protect their own rights and the rights of other lessees at any rate as against unauthorized intrusion? The care and conservancy of the river is vested exclusively in the Commissioners (section 37). All powers, authorities, and privileges, in, over, or relating to the river in any other person ceased (section 37). And the power to make by-laws includes "the well and orderly preserving the River Shannon, and the superintendence, management, and conservation of the river in all respects whatever."

I by no means decide, I am far from deciding, that the Commissioners might not make a valid by-law for the preservation of fish. And for a time I thought this by-law could be maintained on that ground. But the observations that fell from some of the members of the Bench during the argument have satisfied me that this view was erroneous. It may be the individuals here charged have no public right of fishing, but the by-law is admittedly to be construed as affecting all persons whatsoever, and would hit riparian owners with private rights of fishing, and persons fishing as of public right in the lower reaches of the river. It would make all fishing, authorized or unauthorized, destructive to fish or not destructive, a criminal offence. It makes no distinction of times or places of fishing, and would render those who have hitherto enjoyed a public right of fishing in that portion of the river where the sea ebbs and flows liable to prosecution, unless they could show a written permit from the Board, and would make fishery owners with private rights answerable as criminals for fishing in the same ways and means as formerly, unless they also had got a written authority from the Board. No

(1) 17 Ir. C. L. R. 660.

official, no judicial mind, has ever had this particular engine under consideration. No decision has ever been given that it offends against any provision of the Act.

This leads up to the real contention in the case. The Commissioners say, "Any engine is illegal, unless and until we sanction it." The by-law is directed against an *unsanctioned* engine. To make this contention good there must be something in the Act to give such extensive powers. The Act gives the Commissioners special powers to adjudge whether ways or means of fishing are injurious to navigation; but where is there to be found in the Act any authority to make a written permit from the Board a condition precedent to using an instrument for fishing that in this view may be innocent? for unless it be innocent the Board could not sanction it. The object of a by-law is to make definite the offences prohibited in general terms by the Act. It ought clearly to indicate the criminal act which is to subject the accused to a penalty. Read the word "engine" as meaning simply a device, a contrivance; then every device or contrivance for catching eels, or any other fish, "or for any other purpose," whether fixed in the soil, or attached to an anchor, or otherwise supported in its position, is prohibited. The Solicitor-General contends that extensive powers of making by-laws are given, because of the protection afforded by the necessity of the confirmation of two Judges to make them binding. This by-law, however, would effectively exclude all possibility of judicial consideration, for anyone who places anything anywhere in the river for any purpose without a written permission is guilty of an offence.

Whether, therefore, the by-law be regarded as a navigation by-law, or as a fishery by-law, or as a fishery by-law in the guise of a navigation by-law, it does not, in my opinion, define with reasonable certainty any offence. It is too wide, and cannot be sustained. And I am constrained to base my judgment on this ground rather than on the ground that the word "engine" can be construed as an engine capable of obstructing navigation; a construction that I understand found favour with some members of the Court. This construction would also support the decision of the magistrates, for their finding that the structure here was not an engine within the meaning of the by-law would be thus

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upheld. The result would be the same. But I prefer the view that the by-law is *ultra vires*.

WRIGHT, J.:—

From an examination of the Act, 2 & 3 Vict. c. 61, two matters seem to be absolutely certain and free from doubt.

1. The paramount purpose of the Act to be administered by the Commissioners is the care and conservancy of the River Shannon, the improvement of the navigation of the river, and the prevention of anything injurious to navigation being placed in it.

2. The Commissioners are constituted the sole Judges of what may be injurious to the navigation of the river. These two conclusions follow irresistibly from a consideration of the whole Act, including the title of the Act, and particularly of sections 36–38, 42, 44, 56, 58–59 and 73. Very wide powers of making by-laws are conferred upon the Commissioners by section 56; and one of the questions argued before us, and to be decided by us, is whether the by-law does or does not go beyond the powers conferred on the Commissioners by that section.

As a matter of history, the by-law owes its origin to the case of *Hornsby* v. *Considine* (1), decided in May, 1865, and to the suggestion thrown out by Mr. Justice Fitzgerald in his judgment (p. 670), that a general by-law might be made by the Commissioners to prevent injury to navigation by placing engines in the river. Within three months of that decision the by-law in question was passed.

It is certainly general in its scope, in fact it is almost unlimited. It applies to the whole River Shannon, whether tidal or non-tidal; it affects all persons, riparian proprietors as well as members of the public; it is to be in force at all periods of the day and night, and all the year round; it prohibits the use of all fixed engines, whether for catching eels or any other fish, *or for any other purpose.*

It is thus unlimited as to place, time, person, and purpose. The Commissioners arrogate to themselves an absolute power of veto—under the by-law as framed they are empowered to prohibit,

(1) 17 Ir. C. L. R. 660.

by refusing to sanction, an engine which could not by possibility in their judgment interfere with the navigation of the river, and this appears to me to be a vital consideration—they are not bound to justify the withholding of their sanction by any judgment or determination, whether precedent or subsequent. They have not to find, either before or after, that they think there may be injury or obstruction to navigation caused by the use of engines of a particular kind. Under the by-law they are made masters of the position, they are invested with absolute power, and can arbitrarily and irresponsibly, if they choose, prohibit a mode of fishing by fixed engines which could not by possibility interfere with, or to the slightest extent affect, the course of the stream.

That is the right they claim in all cases under this by-law. And I take it as framed, and read into it nothing but what is there expressed; if an engine, absolutely innocuous and incapable of having any effect on the river, as in the present case, is placed in the water by a riparian proprietor without the sanction in writing of the Commissioners, he has committed an offence and incurred a penalty. The offence is complete then, and without any subsequent or previous adjudication or determination by the Commissioners, that the engine is or may be injurious to navigation.

I can find nowhere in the Act words investing them with this supreme power.

I think a by-law which prohibited the placing in the river an engine which, in the opinion of the Commissioners, might prove injurious to the navigation of the river would be free from objection. But the by-law in question is entirely different, and goes far beyond that. It appears to me to be, as I have already pointed out, unlimited in its scope and extent, even to the extent of enabling the Commissioners to prohibit the use of a harmless engine, and to ignore the supreme object of the Act in regard to which their powers are to be exercised, namely, the care and conservancy of the navigation of the river.

Reliance has been placed on section 44, and particularly the concluding proviso of that section. That proviso in my opinion simply declares that the fishery rights of individuals are not taken away, and may be exercised, subject to the one predominant consideration, that they are not exercised in a way injurious to

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Wright, J.

the navigation of the river in the opinion of those whose judgment is, as already pointed out, supreme, namely, the Commissioners.

As to the effect of the concluding words of section 56, providing that the by-law shall be approved of by any two Judges of any of Her Majesty's Courts of Record in Dublin, and declaring the binding effect upon all persons of "such by-laws" when duly made and published, I am of opinion that we are not by these words precluded from inquiring into the validity of this by-law, and that it is open to us to determine whether it is authorized by the section or is not. "Such by-laws" means by-laws made under and within the section. A by-law outside the scope of the section, and not warranted by it, is not such a by-law. A by-law made in strict conformity with the powers of the section may or may not receive the approval of the Judges: they may refuse their approval; until they approve, the by-law does not become operative. They cannot by approving of a by-law wholly unwarranted by the section make it a by-law framed under, and in accordance with, the powers and limitations of the section.

For these reasons I am of opinion that the by-law is bad; and on this ground, and without expressing any opinion on the findings of fact of the magistrates, I think the summons was rightly dismissed.

MADDEN, J. :—

Two questions are involved in this case. First, as to the validity of the by-law under which the prosecution has been instituted, and secondly, whether, assuming the validity of the by-law, the magistrates were justified in holding that an offence against the by-law had not been established in evidence. As regards the former question, I need only say that I have had the advantage of reading the judgment which the Lord Chief Justice is about to deliver, and that I am satisfied, for the reasons embodied in that judgment, that the by-law in question is *intra vires* and valid, as an execution of the statutory powers vested in the Commissioners of Public Works for the regulation and protection of the navigation of the River Shannon. What I understand to be the meaning of the by-law will presently appear. The

question remains whether the facts proved in this case established that there had been a violation of the provisions of the by-law.

If there is anything clear in this case, it is that the proceeding before the magistrates was a fishery prosecution. It was brought at the instance of an inspector under the Limerick Fishery Board. The evidence was directed exclusively to injuries to the eel-fisheries of the River Shannon. According to the evidence of the inspector of fisheries, seven stone of eels were taken by a long line, and the majority of the eels were immature; matters obviously irrelevant in regard to the navigability of the river.

I am far from saying that the Limerick Fishery Board could not avail themselves of the provisions of a by-law which prohibited a mode of fishing which was at the same time injurious to navigation and destructive of fish, or that the Board of Works are disentitled from enforcing such a by-law by reason of their position as proprietors of eel-weirs. But I am clearly of opinion that the validity of such a by-law, when brought to the test, must be decided by a consideration of the powers vested in the Board as Commissioners for the improvement of the navigation of the River Shannon.

The by-law under consideration purports to be made under 2 & 3 Vict. c. 61, the 56th section of which empowers the Commissioners to make such rules, orders, regulations, and by-laws as to them shall seem meet and proper . . . for the well and orderly using and preserving the said River Shannon, and such of the rivers or parts thereof as shall be improved by them as aforesaid." I shall not repeat the reasons which have been so clearly stated, which lead me also to the conclusion that the powers conferred by this section relate only to the user of the river, and of certain of its tributaries, for the purpose of navigation. I shall confine myself to considering whether, on this assumption, the by-law before us is *intra vires*.

On reading this by-law, taken by itself, one would, at first sight, be disposed to regard it as a fishery regulation, and, therefore, *ultra vires*. But taken in connexion with the statute under which it purports to be made, and with the state of the law when it was passed, it assumes a different aspect. If a reasonable construction of the rule will render it *intra vires*, we are bound to give it such a construction, *ut res magis valeat quam pereat*. This general

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principle is rendered specially applicable to this rule by reason of the statutory sanction which it has obtained, and the circumstances under which it came to be made.

In *Hornsby* v. *Considine* (1) the respondent was prosecuted under the 38th section, which prohibits placing in the River Shannon anything which in the opinion of the Commissioners may prove injurious to the navigation. Two engines were set in the river for the purpose of catching eels, consisting of iron frames with nets attached, which lay on the bed of the river held by an anchor. There was uncontradicted evidence that the placing of such engines in the bed of the river was an obstruction to navigation. The magistrates dismissed the case on the ground that the Commissioners had not determined that the engines in question were injurious to navigation, and their decision was upheld by the Court of King's Bench. Pressed by the Attorney-General with the great public evil which would result if the Shannon were covered with engines of this kind, Fitzgerald, J., observed—"The Commissioners have power under this section to make by-laws, and, if they think this is a nuisance to navigation, forbid it accordingly." The judgment in *Hornsby* v. *Considine* (1) was delivered on May 29th, 1865. The by-law under consideration is dated August 9th in the same year. It is sanctioned by Lefroy, C.J., and by one of the Judges who had the matter under consideration in *Hornsby* v. *Considine* (1), Hayes, J. It is evidently the outcome of the observations made by Fitzgerald, J., and the history of the by-law supports the conclusion that the Commissioners in enacting this by-law acted solely with a view to the navigation of the River Shannon, and that they did not intend to usurp the function of Fishery Commissioners.

I have no difficulty in applying to the by-law a construction which will bring it within the powers conferred by the 56th section of the Act; and here I am aided by a principle of construction which, although limited in its operation by some recent decisions, is still of use in cases to which it is fairly applicable. The by-law prohibits the placing in the river "any frame or engine" not previously sanctioned by the Commissioners. The purpose for

(1) 17 Ir. C. L. R. 660.

which the frame or engine is placed in the river, whether for fishing or otherwise, is immaterial. The mischief from the point of view of the conservators of a navigable river is the possibility of obstructing navigation. The word "engine" is a word of very general application, and its meaning in any particular document must be determined by the context, and by the general purpose of the writing in which it occurs. Here it is found in a by-law for the protection of navigation. It is found in connexion with a word "frame," signifying a thing capable of forming an obstruction, if placed in the bed of a navigable river. By "engine" in such a connexion I have no difficulty in understanding such an engine as is *ejusdem generis* with a frame.

A line is defined as of one dimension only, and I cannot regard the arrangement of a night-line and the addition of the lead or stones by which it is kept at the bottom, as an engine substantially and really of three dimensions of space, and thus capable of forming an obstruction. I can see nothing unreasonable in requiring the antecedent sanction of the Commissioners for the placing of such an engine in the bed of a navigable river; and if it be read as I have suggested, the by-law appears to me to be *intra vires*. That the magistrates were right in holding that a long line at the bottom of the River Shannon is not within the meaning of the by-law so construed is, to my mind, clear. Indeed no evidence was attempted to be given of an impediment to navigation capable of materially contributing to the obstruction of the Shannon as a navigable river.

JOHNSON, J. :—

The Shannon is, by the Act 2 & 3 Vict. c. 61 (1839), declared (s. 36) to be a public navigable river for all the subjects of the realm, without hindrance or obstruction, subject to such by-laws as may be made by Commissioners appointed under the Act (now represented by the complainants, the Board of Works), in whom is vested, by section 37, "the care and conservancy" of this public navigable river; and the question for decision is the validity of a by-law made by the Commissioners, and approved by the late Chief Justice Lefroy and Mr. Justice Hayes on the 10th August, 1865. The Shannon rises in the Shannot Pot, 14 or 15 miles

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from Carrick-on-Shannon, in the county Leitrim (1), and from that to its mouth, between the counties of Clare and Kerry, is over 200 miles in length. In its course it broadens into several large sheets of water: first, Lough Allen, about 8 miles long by 3 wide (up to which it is navigable); next, Lough Ree, about 16 miles long by 3 wide; and next, Lough Derg, about 22 miles long, and between 2 and 3 wide. It washes, as it flows, the shores of between ten and eleven counties; and, without regard to local requirements, or limitation or definition of districts, or to places where navigation of any kind is impracticable, or to existing rights, this by-law is, in its plain terms, applicable to all this vast extent of the river. Section 56 empowers the Commissioners to make such by-laws as shall to them seem meet and proper for several specified purposes for the orderly use and preservation of the river, and keeping it clear for navigation, and (*inter alia*) "for the superintendence, management, and conservation of the said River Shannon in all other respects whatever": that is and can only be to keep the river clear for navigation; and "such by-laws" (that is, made in conformity with the statutable power) "shall be binding upon, and shall be observed by, all persons whatever, and sufficient in all Courts of Law or Equity to justify all persons who shall act under the same, provided that such by-law is approved by any two Judges of one of the Superior Courts in Dublin."

The summons in this case appears to be under section 38 of the Act; and the words of the by-law now under consideration are—"Any frame or engine, whether fixed in the soil of the river or attached to an anchor, or otherwise supported in its position." "Frame" is described in *Hornsby* v. *Considine* (2), viz., a large iron mouth of an eel-net, like the letter D, 8 feet by 5 feet, with its top level with, or projecting 6 inches above, the surface of the river, kept upright on the bed of the stream by anchors and chains. Such a machine is obviously of a permanent character, and injurious to the navigation of the river. The word "engine," disjointed from the term "frame" by the alternative particle "or," is not defined in the by-law. It is a very general word, in common use, and conveys to the mind of an ordinary person a

(1) Philips's Atlas and Geography of Ireland, by Joyce.
(2) 17 Ir. C. L. R. 660, at p. 668.

machine of some kind, consisting of different parts, and producing an effect by the help of mechanical power, *e.g.*, fire-engine, water-engine, ship's capstan, or the like; but in this by-law the context, "any frame or engine, whether fixed in the soil of said river, or attached to any anchor, or otherwise supported in its position," shows that the engine contemplated by the by-law was some kind of contrivance or instrument in the nature or character of a frame, with an element of fixture or stability about it. But this long line or tram-line for eels, lying loose at the bottom of the river, and kept down by "small stones, about 1 lb. in weight, with end stones, about 4 lb.," could not, I think, be described by any reasonable person as either a "frame" or "engine." The by-law is plainly a fishery by-law, to preserve the regular eel-fisheries and weirs of the Shannon; and a by-law for that purpose might possibly be made lawful by the Fishery Inspectors prohibiting these tram-lines as injurious to the fishery. The Fishery Inspectors have made a by-law of this kind in force in Lough Owel. But prohibition of what is injurious to the fishery only is not the duty of the Board of Works under this Act, whose duty is the care and conservancy of the navigation of the river; and even if the complainants (contrary to the facts) expressed their opinion in this by-law (which they have not done, nor is there the least likelihood they would do so) that these long lines may prove injurious to navigation, they could not thereby give themselves jurisdiction to make this by-law under the Act (1). The case, therefore, is reduced to this: the long lines or tram-lines in question are not frames or engines within the by-law, and this is my opinion; or, they are within the by-law; and if so, the by-law is too wide—is unreasonable and uncertain, and therefore invalid and *ultra vires*. The by-law purports to provide that the frame or engine shall not, without the sanction of the Commissioners under their hands, be placed in any part of the river for catching eels, or for any other purpose; and section 56 of the statute provides that such by-law (that is, as I have stated, in my opinion, if made in conformity with the statute) shall be a sufficient justification to any person acting under it in any Court, provided it is approved by two

(1) Paley, 9th edition, p. 165.

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Judges of a Superior Court of Record in Dublin. But the approval of the two eminent Judges who approved of this by-law does not make it valid: *Tailors of Ipswich Case* (1); *The Stationers of London* v. *Salisbury* (2)—"Sir Barth. Shower: 'Suppose it (by-law), upon due proof, to be allowed by a certain officer, sure that were good?' Holt, C.J.: 'I doubt that.' Sir B. Shower: 'This by-law was signed by the Lord Chancellor Finch.' *Curia*: ''Tis never the better for that, for that is done of course. So we use to do in the Circuits; for if the orders be not good, let the parties look to that at their peril.'"

Statutable or any other approval does not make a by-law valid if not otherwise lawful: *R.* v. *Wood* (3), where the by-law had been approved by the Secretary of State, and where *certiorari* was taken away. In *Kruse* v. *Johnson* (4), relied on for the complainants, Lord Russell, C.J., points out (p. 98) how Parliament, when it thinks fit to delegate, even to public representative bodies, the power of exercising their own judgment as to what are the by-laws which to them seem proper to be made for the good rule and government in their own localities, accompanies that power with ample safeguards against its abuse; and he points out the safeguards in that case, and in the course of his judgment he says: "I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable." Similar safeguards in the public interest are provided by the Municipal Corporation Act, Ireland (5). In *Lockwood's Case* (6), in the House of Lords, Lord Herschell says (p. 357), in reference to by-laws made by the Board of Trade, the result is to leave the matter completely in the control of Parliament, because any of the rules made by the Board of Trade may be annulled by either House of Parliament within forty days after they are laid on the table, and the laying of them is made compulsory.

In the present case there is no Parliamentary or other control, and I think it is the duty of this Court to decide whether this by-law is valid or not.

(1) 11 Rep. 53 a. (4th Resolution.)
(2) Comberbach, 221.
(3) 5 El. & Bl. 49.
(4) [1898] 2 Q. B. 91.
(5) 3 & 4 Vict. c. 108, s. 125.
(6) [1894] A. C. 347.

For these reasons I am of opinion that—1st, the fishing-lines in question are not frames or engines within the meaning of the by-law; and, 2nd, the by-law is too wide, and is unreasonable and uncertain, and therefore *ultra vires* and invalid; and that the magistrates were right in dismissing the summons.

ANDREWS, J.:—

The defendants in this case were charged by the Commissioners before Justices at Petty Sessions with an offence against a by-law, which purported to have been made on the 9th August, 1865, by the Commissioners of Public Works in Ireland, and approved of on the 10th of that month by two of the Judges of the Queen's Bench in Ireland, under the authority of the 56th section of the Act of 2 & 3 Vict. c. 61, for the improvement of the navigation of the River Shannon. The powers and duties of the Commissioners under that Act were transferred to and vested in the Commissioners of Public Works by the Act 9 & 10 Vict. c. 86, s. 2. The by-law is in the following terms:—[His Lordship read the by-law]. The lines which were placed by the defendant in the River Shannon for catching eels are described in the case stated as having extended over a mile and a half in length, with stones attached to them at intervals of 40 yards, and twelve to twenty hooks between each stone; and, in my opinion, they constituted "an engine for catching eels" within the meaning of the by-law. They were a physical structure, composed of different parts, fit and used to effect the purpose of catching eels.

By the 44th section of the Shannon Navigation Act it is provided that it shall be lawful for any person in whom any right of fishing in the Shannon is vested to exercise such right by *any* means which the Commissioners "shall deem not injurious to the navigation," and the lines in question constituted a means of exercising such right of fishing. Any person in whom such a right of fishing is vested is, therefore, in my opinion, entitled to, and can enforce, a decision by the Commissioners, whether the means by which he desires to exercise such right is, or is not, injurious to the navigation. If they deem it not injurious to the navigation, the 44th section expressly gives him the right to exercise it, and he is entitled to know whether the Commissioners

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deem it not injurious to the navigation, as on this the lawful exercise of his right depends; and it is their duty to decide this question. The power to make by-laws conferred on the Commissioners by the 56th section of the Act, for (*inter alia*) the well and orderly using and preserving the River Shannon, and the superintendence, management, and conservation of it, notwithstanding the wide terms in which that power is conferred, and the enactment that such by-laws shall be binding upon all persons, provided they be approved of by any two Judges of any of the Superior Courts of Record in Dublin, cannot authorize a by-law which disregards, or may override or defeat, any of the provisions of the Act. The by-laws which are authorized are for giving effect to and carrying out the provisions of the Act. Now, the by-law in question purports to make it an offence, punishable by fine, for *any* person, without the sanction of the Commissioners in writing under their hands, to use the means of fishing therein referred to, namely, by placing in the river any frame or engine for catching fish. This amounts to giving an absolute and unqualified power to the Commissioners, by withholding their sanction, to prevent any person having a right of fishing in the Shannon from exercising his right by the means referred to in the by-law, without any decisions being come to by the Commissioners whether such means is, or is not, injurious to the navigation, or any consideration by them of that question; nay, more, to prevent the exercise of the right made lawful by the 44th section, even though the Commissioners should deem the means of exercising it not injurious to the navigation. In my opinion, this by-law purports to give the Commissioners power to ignore and disregard the 44th section of the Act, which they cannot do, and the by-law is therefore *ultra vires* and void.

If, as was argued by the Solicitor-General, the intention of the by-law was merely to enable the Commissioners to consider and determine, before the frame or engine therein referred to was placed in the river, whether it would be injurious to the navigation, a valid by-law can be made for that purpose; but the absolute and unqualified power which the by-law as it stands purports to confer on the Commissioners goes far beyond this.

In my opinion, the dismissal of the complaint by the Justices

was right, and should be affirmed, on the ground that the by-law on which it was founded is *ultra vires*, but not upon the grounds stated by the Justices, as, in my opinion, it is for the Commissioners alone to decide whether any particular means of fishing is, or is not, injurious to the navigation, and the weighted lines, with hooks, which the defendants used, constituted, in my opinion, "an engine for catching eels" within the meaning of the by-law in question.

PALLES, C.B, concurred in the judgment of ANDREWS, J.

LORD O'BRIEN, L.C.J.:—

The by-law which has been impugned in this case was approved of forty years ago by Lord Chief Justice Lefroy and Mr. Justice Hayes, and, though since in force and constantly applied, its validity has not until now been questioned. It is intituled "River Shannon By-law," and runs thus:—"2 & 3 Vict. c. 61. It shall not be lawful for any person or persons, *without the sanction of the Commissioners* of Public Works in Ireland (such sanction to be signified in writing, under the hands of the said Commissioners for that purpose), *to place in any part* of the River Shannon *any* frame or *engine* for catching eels or any other fish, or *for any other purpose*, whether such frame or engine be fixed in the soil of said river, or attached to any anchor, or be *otherwise supported in its position*." This is the by-law. I call attention to the words "*any engine*," and to the words "*to place in any part of the River Shannon*." "Any part," I take it, means, or at least includes, any part of the waters, bed, or soil of the river. I call attention also to the words "*for any other purpose*." What, then, is an engine? We are told by the high authority of Lord Blackburn that it is a "device" or "contrivance." The word "engine," says that distinguished Judge, "derived from 'ingenium,' includes a snare, which is a device or contrivance—an engine—for killing game": *Allen* v. *Thompson* (1). I believe the word "*any*" before "engine" and before "part" was deliberately introduced, having regard to the arguments and judgments in the case of *Hornsby* v. *Considine* (2). The by-law seems to me to

(1) L. R. 5 Q. B. 339. (2) 17 Ir. C. L. R. 660.

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have been prepared with the most minute care. One of the Judges who approved of it was Mr. Justice Hayes, who was party to the decision in *Hornsby* v. *Considine* (1). It is said it is invalid. Why so? We must judge of the validity of the by-law, not only by the language in which it is expressed, but also by the language and object of the statute under which it purports to be made.

Do those who impugn its validity contend that it is invalid because it gives the Commissioners power to select a place where an engine may be placed in the waters or in the bed of the river? Do they arrogate to themselves, or claim for the public, an uncontrollable right to select the position where an engine may be placed? Do they assert a right to determine whether they will set up an engine in, if I may use the expression, the "highway" of the river—in its most crowded part, where free passage is essential to navigation? Why, if this could be done, the Commissioners would be so many cyphers, and the main object of the Act would be entirely defeated. In fact, the Shannon Acts, in so far as they related to their main object, viz., navigation, might be torn up.

In my opinion, the Commissioners (I use the word as applying both to the Shannon Commissioners and their successors, the Commissioners of Public Works) are supreme, both as to the selection of a position in which an engine may be placed in the Shannon, and as to the question whether a particular instrument is or may be injurious to navigation. If a controversy was to be permitted in a Court of law as to when a particular engine was capable of being an injury to navigation, the dispute might be endless; if it was permitted to be actionable matter, there might be, having regard to the vast extent of the Shannon, as many actions as—I had almost said—there were fish in the river. The interests of navigation are the paramount object; and the Commissioners have an uncontrollable right to determine whether any particular engine is injurious to navigation; or, if it be not in itself injurious to navigation, to determine at what spot it may be placed in the River Shannon without peril to the interests of navigation. And it is to be remembered that an

(1) 17 Ir. C. L. R. 660.

engine may be placed in one place without injury to navigation, and not so in another. This depends upon the character of the instrument and the particular part of the river where it is proposed to place it, a matter involving discrimination, as pointed out by Mr. Justice O'Brien in the closing sentences of his judgment in the case of *Hornsby* v. *Considine* (1)—a discrimination left by the statute and the by-law to the discretion and judgment of the Commissioners exclusively. Once it is an engine, "supported" or "kept," or, to use the word suggested during the argument, "maintained," in its position for any purpose, fishing or otherwise, it is the exclusive province of the Commissioners to determine whether it may be injurious to navigation in the position it is proposed to be placed in the river. And as to its *position in the river*—a most important matter—it must be also remembered that those who propose to place an engine in the river may be wholly reckless as to navigation. There might be a very vehement struggle amongst many to place engines in a particular part of the river; to overcrowd the highway of the river with engines. Unless there was a very stringent control, the free passage, the navigation of the Shannon, might be readily impeded. The whole scope of the 2 & 3 Victoria, styled "An Act for the improvement of the navigation of the River Shannon," shows that the Legislature dealt with the navigation of the Shannon as a matter of national importance and concern. Let me then examine the by-law. Is it obscure? In my opinion it is perfectly clear. It provides that, before anything in the nature of a frame or engine for catching eels, or other fish, or any other purpose, be placed in the river (whether such frame or engine be fixed on the soil of said river, or attached to any anchor, or *be otherwise supported in its position*), the sanction of the Commissioners for that purpose shall be obtained. It is because this sanction was not obtained, that the summons was brought. It complains "that the defendants, *without the sanction of the Commissioners*, placed in the waters of the Shannon an engine for catching eels, supported in its position by stones attached thereto."

We should be careful to remember the language of the sum-

(1) 17 Ir. C. L. R. 660

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mons, and the nature of the complaint made. But to return to the by-law. The catching of eels is specially mentioned. No other description of fish is specified; nor are the "other purposes" referred to specifically described. I can well understand that the public along the banks of the Shannon sought in every possible way to use, or abuse, the waters of the river for the catching of eels, by every description of engine or instrument, whether injurious to navigation or not, placed in any part of its waters. It cannot be gainsaid that placing and keeping an engine for catching fish or otherwise in the waters of the Shannon is a using of the Shannon and its waters. We must bear in mind the object of the 2 & 3 Vict. c. 61. It was declared, as appears from the preamble of the Act, that the improvement of the navigation of the River Shannon from its source in Lough Allen, in the county of Leitrim, to its mouth, would contribute to the general prosperity, commerce, agriculture, and revenue of Ireland, and would also tend to the advantage and improvement of the respective counties and districts adjoining such navigation. The navigation of the Shannon was of national concern, of supreme importance in the eye of the Legislature. Anything and everything that might be calculated to interfere with the navigation should be closely scrutinized. It was obviously expedient and just that the Commissioners who were to control the navigation, and provide for the well and orderly using of the river, should have, not only a remedial but a preventive authority—a remedial authority to order the removal of existing obstacles that were already placed in the waters of the Shannon; and a preventive authority to forbid the placing in the waters of the river of objects or things which might in their opinion be obstructive to navigation or inconsistent with the proper use of the river. A preventive authority is most obviously expedient and just, indeed, I would say, absolutely necessary, in the case of such a vast river as the Shannon, many hundreds of miles long, and, in many places, several miles broad. A mere authority to remove, as distinguished from an authority to prevent, would be entirely inadequate and inexpedient. "Removal" implies the existence of mischief and its discovery. Its discovery would be a somewhat precarious matter, at least before mischief is done, in a river of such great dimensions, and removal might involve

great delay and expense; whereas a preventive authority anticipates and prevents mischief to the river and to navigation, and provides against expense. It is fair by the river, fair by its use, fair by its navigation, and fair by those who propose to place in the waters of the river an engine for fishing or any other purpose. The Lord Chief Baron, in a well-known judgment in the case of *Ex parte Tanner*(1), refers to the value and expediency of preventive justice. A preventive authority, with, so to speak, an all-searching eye, sees what might be injurious to navigation, and inconsistent with the proper user of the river, and prevents it. And prescribing the necessity of an antecedent sanction is always the most effectual way of giving effect to preventive justice. With manifest expediency and obvious justice the by-law in effect provides—for this is the effect of an antecedent sanction—that the Commissioners, who are supreme, shall be informed of the character and nature of the engine or instrument proposed to be placed in the waters.

Now comes the question—Was there authority to make the by-law—to make the particular by-law? In my opinion it is manifest that there was. My view is that the by-law was not *ultra vires*, and was manifestly reasonable. I am of opinion that it would fail in its object, and fail to carry out the object of the statute, unless it was as wide as it is expressed. I think this view is in accordance with the general scope of the Act; but it is plainly maintainable, having regard to the 36th, 37th, 38th, 42nd, 44th, and 56th sections of the Act. Let me refer at least to some of them. By the 36th section of the Act it is declared that the River Shannon should be ever thereafter a public navigable river; and that all the Queen's subjects should enjoy a *free* passage through the river, without *let, hindrance, or obstruction whatsoever*. By the 37th section of the statute the "care and conservancy" of the Shannon is vested in the Commissioners exclusively. By the 38th section it is provided that no weirs or other obstructions shall be placed in the river which, *in the opinion* of the Commissioners, may prove injurious to navigation. The 42nd section confers a remedial authority. It enables the Commissioners to remove all obstructions *in their opinion* injurious to navigation. I now come

(1) Crimes Act Cases, 350.

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to the 44th section, which contains an important proviso. It is as follows :—" Provided always that it shall be lawful for any person or persons whatsoever in whom any right of fishing in the said River Shannon, or in any of the rivers aforesaid, now is, or hereafter shall be, vested, to exercise such right *by any ways or means which the said Commissioners shall deem not injurious to the navigation* of any of the said rivers, or to the drainage to be effected under this Act, as long as such right shall continue to be legally vested in such person or persons."

This is illustrative of what I call the complete and absolute control and authority of the Commissioners as to anything and everything that may, in their opinion, affect navigation. It provides here, even as to vested rights of fishing, that these shall be carried on only by such ways and means *as the Commissioners shall deem not injurious to navigation.* As regards all vested rights, present and future, the ways and means of fishing must be such as the Commissioners do not deem injurious to navigation. Even in the case of vested rights, the opinion of the Commissioners as to ways and means of fishing is paramount. Everything is rendered subordinate to navigation; and, as to what is injurious to navigation, the opinion of the Commissioners is paramount, and cannot be questioned.

I come now to the 56th section of the Act, the most important section of all; I mean the section which confers authority to make by-laws. It enables the Commissioners to make such by-laws *as to them shall seem meet and proper* (I emphasize the words "as to them shall seem meet and proper"), for the well and orderly *using* and preserving of the Shannon, and for "the *superintendence, management,* and conservation of the river," and "*in all other respects whatsoever.*" These words are practically as wide in their operation as they could be; they are practically all-embracing; they embrace everything that may affect the free passage and the using and the superintendence and management of the river; and as to all these matters the Commissioners are supreme. It was their exclusive function to deal with all this.

The dominant intention of the 56th section was the conferring discretion on the Commissioners as to the frame and character of

the by-laws, subject of course to the approval of two Judges of a Superior Court. Well, the Commissioners have exercised their discretion, and the two Judges of the Superior Court have approved. By the exercise of discretion, I mean a *bona fide* real honest exercise of honest discretion, untainted by fraud, collusion, or indirect object or motive. I mean a real exercise of discretion and not a sham one. And it must be remembered that in this case it was not suggested that the action of the Commissioners was at any stage dishonest or *mala fide*. Of course the approval of the Judges would be *bona fide*. We have then, what? We have the object right, viz., the regulation of the user of the Shannon; we have the method right; we have an adequate protective security in the by-law which seemed "meet and proper" to the Commissioners, and was ideally adapted to keeping the navigation clear; and we have the approval of the two Judges of a Superior Court of Record in Dublin—all the elements essential to the validity of the by-law are in my opinion present.

I might here refer to a passage in the judgment of Lord Watson in the case of *The Institute of Patent Agents* v. *Lockwood* (1); he is reported to have said (page 364): "Now it appears to me that the whole scheme was left to the discretion of the Board of Trade; and it is impossible for me to say that, looking to those regulations, the Board of Trade have in any measure exceeded that discretion. *It was by their opinion, not by any judicial opinion, that the matter was to be determined.* The Legislature retained so far a check that it required that the regulations which they framed should be laid upon the tables of both Houses; and of course these regulations could have been annulled by an unfavourable resolution upon a motion made in either House." This passage shows that, in the case before Lord Watson, the opinion of the Board of Trade, and in the case before us, so far at least as related to by-laws, the opinion of the Commissioners, is paramount, subject to one check only, viz., that the proposed regulations in the case before Lord Watson should be laid on the tables of both Houses of Parliament, and in the case before us that the by-laws should be approved, not by one only, but by two Judges of a Superior Court. The

(1) [1894] A. C. 347.

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authority, the statutory authority, to approve was a *legal* authority, viz., Judges of the Superior Court, not what might be an exclusively *lay* authority, such as the Privy Council, or Secretary of State, but such persons, to wit, Judges of the Superior Court, who could give an authoritative legal sanction. The by-law was, by the Act of Parliament, specially referred to them as the authority to consider its legal validity. Their duty was to *approve* —mark the word—not merely to sign or identify, but to approve; and the fact that not one, but two Judges were necessary to the approval of the by-law plainly shows that that approval was to be done in conference between the two Judges. The by-law was to be examined by men of legal erudition and authority, and the statute under which it purported to be made was carefully to be considered by men skilled in the construction of statutes. Views were to be interchanged and checked, in conference. However, it is not necessary for the purposes of my judgment to decide that the approval of the two Judges of the Superior Courts concludes the controversy as to the validity of the by-law. I deal with the case on the somewhat anomalous basis that one local magistrate, as the case might be, could overrule two Judges of the Superior Courts on a matter of law. The Legislature may well have thought that two Judges of the Superior Courts were enough to secure the proper framing of the by-laws even for the Shannon.

But to continue my examination of the statute. The care and conservancy of the river was vested in the Commissioners exclusively; and the method, ways, and means of care and conservancy the Commissioners had an exclusive right to determine. We cannot arrogate to ourselves the right to say that such a thing is or is not necessary to the care and conservancy of the river; we intrude upon the exclusive province of the Commissioners if we attempt to do so. It was their exclusive function and authority to determine whether anything in the nature of a fixed engine for the catching of fish, or any other purpose, is, or could be, injurious to navigation. If, in their opinion, an engine, having regard to its nature, its proposed user, or its proposed position, could not be injurious to navigation, or inconsistent with the proper user of the river, then the Commissioners were bound to give permission to have any such engine placed in the waters of the Shannon. And

if they refused to give such permission, they would violate their duty, for which they might be brought before Parliament, and dismissed from their office. (As to the power to appoint and remove them, see sections 2 and 3 of the statute.) It must be remembered that no suggestion has been made that the Commissioners dishonestly abused their discretion. The Commissioners were, no doubt, selected for the post by reason of their high character and apparent sense of responsibility. But it is well to quote the language of the concluding part of the section: "And such by-laws, rules, and orders shall be *binding upon and shall be observed by all persons whatsoever*, and shall be sufficient in all Courts of Law or Equity to justify all persons who shall act under the same: Provided that such by-laws, rules, and orders be approved of by any two Judges of any of Her Majesty's Superior Courts of Record in Dublin."

What is the effect of this provision? This—To make such by-laws, including the by-law under consideration, when approved of by any two Judges of the Superior Courts, "binding upon all persons whatsoever." The by-law in question was approved of by Lord Chief Justice Lefroy and Mr. Justice Hayes, Judges of eminence. No one had in his day a greater judicial reputation than Lord Chief Justice Lefroy; and certainly there could be no Judge more fully qualified to deal with a case of this kind than Mr. Justice Hayes. I entirely agree with what the Lord Chief Baron said during the argument of him as to his entire qualification for such a task. I do not at all pretermit consideration of the word "such." "Such by-laws" mean by-laws for regulating the using of the navigation of the Shannon by such ways and means as the Commissioners shall adopt, and shall be approved of by two Judges of the Superior Courts. Well, is the work of these two Judges to be overthrown by local magistrates? I make no reflection on the magistrates who heard this case. I have the pleasure of knowing one of them, Mr. Dease, a most competent and careful magistrate. But is a magistrate, as the case might well be, who never read a law-book in his life, and whose experience was of a mere bucolic character, to be at liberty to override the Judges of this Court, who were appointed by the Act of Parliament as a special tribunal to approve or disapprove of the by-law,

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and to say that what Judges of eminence have, when acting under express statutory authority, declared to be reasonable and not *ultra vires*, and binding on all persons, is not so in fact, but is unreasonable and *ultra vires*, and binding on no person? This certainly is very anomalous. But for the opinion of my brethren, which I so much respect, I should have no difficulty in holding that the manifest object of the Act was to place the by-law beyond the influence of popular and local surroundings, to give a statutory authority and effect to the by-law, and to confer upon the magistrates, not the power of overruling the Judges, and of setting at naught their work, but the power of determining what comes within the operation of the by-law, what is amenable to the by-law, what, so to speak, is caught by the by-law. It is not necessary for my judgment to go so far in this case; but I am far from saying that I would not be justified in so doing. I might refer to the language of Lord Herschell in the case I have already referred to, *The Institute of Patent Agents* v. *Lockwood* (1). He is reported, at pages 359 and 360 of the report, to have said:—"The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule if validly made is precisely the same, that every person must conform himself to its provisions; and if in each case a penalty be imposed, any person who does not comply with the provisions, whether of the enactment or the rule, becomes equally subject to the penalty. But there is this difference between a rule and an enactment, that whereas, apart from some such provision as we are considering, you may canvass a rule, and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. Therefore, there is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority, but that very substantial difference, if it is open to consideration, whether it be so or not."

This is the language of Lord Herschell. Well, was there statutory authority to make this particular by-law? Authority

(1) [1894] A. C. 347.

was expressly given to the Commissioners to make such by-laws *as to them shall seem meet and proper*, for regulating the "*using*" of the River Shannon; and for the "superintendence," "regulation," "management," and "conservation" of the River Shannon, and "*in every other respect whatever.*" As I have already said, "putting," "placing" engines in the River Shannon is manifestly a "using" of the river; and a by-law which requires permission to be granted before an engine can be placed in any part of the waters of the Shannon is a regulation with reference to the using, superintendence, and management of the River Shannon; and upon this matter the opinion of the Commissioners is paramount. They have thought this particular by-law "meet and proper" in reference to the using, regulating, and managing the Shannon. The object was right. It was directly sanctioned by the Act of Parliament to regulate the user of the Shannon, to manage the Shannon; and the ways and means to this were matters for the Commissioners exclusively. It was by their opinion, as approved of by two Judges of the Superior Court, that the matter was to be determined. This is the very point of the decision of the majority of the Court in the case of *The Institute of Patent Agents* v. *Lockwood* (1); and it was with reference to this that Lord Morris differed, I think, with profound respect, erroneously from the majority of the Lords. He gave in his judgment no effect to the words "as are *in the opinion of the Board* required for giving effect to this section." Lords Herschell, Watson, and Russell plainly thought these words "*in the opinion of the Board*" the determining factor. Lord Herschell (at p. 359) is reported to have said:—"My Lords, the words of sub-section 2 are: 'The Board of Trade shall as soon as may be after the passing of this Act, and may from time to time, make such general rules as are in the opinion of the Board required for giving effect to this section; and the provisions of section 101 shall apply to all rules so made as if they were made in pursuance of that section.' Therefore any rule which, *in the opinion of the Board of Trade*, is required to be made in order to give effect to the section, is a rule made pursuant to

(1) [1894] A. C. 347.

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sub-section 2; and any rule made pursuant to the provisions of sub-section 2 is to be dealt with as if made pursuant to section 101 of the principal Act."

In deference to Mr. Justice Johnson, who referred me to two cases, I wish to say a word with reference to them, and to some other topics. Such cases as *The Master Wardens* v. *Salisbury* (1) and *The Queen* v. *Wood* (2) have, in my opinion, no application to the case before us. The cardinal provision here —that the by-law shall be binding on all persons whatsoever, if approved by two Judges of the Superior Courts—is not to be found in those cases: not that I think it essential to lay down that the approval of the Judges is conclusive. Here, however, in my opinion, the by-law was made pursuant to statute, as well as approved of by two of the Judges of the Superior Courts. There was here no taint of Common Law illegality, as there was in the case of *The Master Wardens* v. *Salisbury* (1). But the quaint passage in the old report that has been referred to shows that the case has no bearing at all upon the case before us. Shower, the counsel in the case, is reported to have said: "This by-law was signed by Lord Chancellor Finch." This was the submission of counsel, but mark the answer: *Curia*—"'Tis never the better for that, for that is done *of course*." Can anyone contend for a second of time that the approval or disapproval of the by-law not by one, but, as I have said, two Judges of the Superior Courts is a matter of course. And the case of *The Queen* v. *Wood* (2), so far from being an authority to show that the by-law before us was bad, is an authority rather the other way. That was a case where the statute, the Public Health Act, enabled by-laws to be made directing the occupiers of houses to remove filth. A by-law was made directing the occupiers to remove snow, which was plainly unauthorized. Lord Campbell said there was no analogy between filth and snow. The latter was proverbially pure—"pure as snow"; the by-law was very naturally pronounced by the Court to be *ultra vires*. But what was the object of the principal Act here? To regulate the user of the Shannon, the navigation of the

(1) Comberbach's Rep. 222. (2) 5 E. & B. 49.

Shannon—the thing expressly provided for, and by-laws for this object such as the Commissioners should think meet and proper were to be passed. The object in the case of the by-law in *The Queen* v. *Wood* (1) was wholly illegal and *ultra vires*, and in the case before us the object was the very thing which the statute had in view. The distinction between the two cases plainly tends to show that the by-law in the present case is *intra vires* and not *ultra vires*.

I come now to the point as to whether the contrivance was within the by-law. Was it amenable to the by-law? Was it, so to speak, hit by the by-law? This contrivance was, it is said, like the plaything of our youth, a device composed of strings, it may be bits of rope, which we would place in streams to catch eels. Well, what is this instrument? It is about 3½ miles long; about 1¾ miles on each side of the river. It is essential to look at the map that was given in evidence to see its position and course; and it will be observed that it not only ran along the Shannon, but crossed it. Two men were engaged; the line was paid out from a boat, and was supported, I might say anchored, in its position by a series of stones, and was equipped with a vast quantity of hooks for killing fish—catching fish. Now then, a boat, a line over three miles in length, the letting down and taking up of which involve considerable time and trouble, and which is supported in its position by a series of stones, and equipped with several hundred hooks, were employed. This instrument could not, I think, with any approach to accuracy, be compared to the plaything of youngsters. A test has been suggested in the question: Would a rod whose end near the reel is run into the ground while the owner has retired for lunch, or was eating a sandwich on the bank, be an engine within the meaning of the by-law? Mr. Fitz Gibbon, who argued the case so admirably, declined to adopt this test, and rightly, because the supposed case involved no real element of stability at all. The normal use of a fishing-rod is a manual personal use—it is worked by the hand; whereas the engine under discussion works by itself from a particular place to which it is attached.

(1) 5 E. & B. 49.

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But the so-called *ejusdem generis* rule of construction is appealed to. It is said that, tested by this rule, this engine or instrument is not within the by-law. But if it be, as it is, an engine supported in its position, is it not plainly *ejusdem generis*? Has it not that element of fixedness which makes it *ejusdem generis*? The essential feature, the characteristic feature, of the instrument is, that it is supported in its position, indeed I might well say "anchored" in its position, by a series of stones. A net fastened by an anchor, strictly so called, is, *ex concessis*, within the by-law. Why should not this instrument, which is fastened, anchored, in its position by a series of stones, be also within the by-law? It is, in the very language of the by-law, "otherwise supported in its position." Besides, it must be remembered that there is no manual personal user of the instrument required (see argument of Sir John Holker and judgment of Lord Blackburn in *Allen* v. *Thompson* (1)). And all the instruments in the by-law are worked in the same way: they are put down and left to work for themselves.

But it is contended that this instrument is not within the by-law, because it is alleged that it cannot, in its three-mile route, in any way directly or indirectly interfere with navigation. This, though I have a clear opinion, I decline to determine—I am careful not to arrogate to myself the function which the statute devolves upon others—namely, the Commissioners.

Whether this contrivance might lead to entanglement with vessels, boats, or crafts (there are all sorts and sizes) on the Shannon, and the expense and delay of disentanglement, I know not. Suppose the rudder was caught by the rope, what would become of the craft to which the rudder belonged? Would it become a sort of merry-go-round in the waters of the Shannon?

If the rope got away from the stones, or the stones were disengaged from the rope in the swift, strong tide of the Shannon, what would be the result? This instrument of fishing might under such circumstances be any place high up or low down in the waters of the river.

(1) L. R. 5 Q. B. 338, 339.

What entanglement might involve, especially at night, for it was at night the instrument worked, I know not.

Would all this be calculated to impede navigation? Would it involve delay, very great delay, or no delay? Would it impede the free passage of the river? If a vessel, boat, or craft upon the Shannon caught the rope, would it immediately break it? This would depend upon circumstances, the size of the vessel, boat, or craft, the speed at which it was travelling, the strength of the rope, and the size and weight of the stones, and how they were fastened to the rope, and the depth of the water at any particular place the equipped rope was, and the exact position of the instrument in the water.

If this equipped rope was displaced, would it be displaced for over a space of three miles? What would be the effect of displacement? Would the instrument equipped as it was be dragged in a straight line along the Shannon, or obliquely across it? What effect would dragging have on an instrument that crossed the Shannon, and ran down for at least a mile and a-half at both sides? I used the word "sides" for convenience of description; but it is to be remembered that this instrument did not hug the sides or shore of the Shannon, but was well out in the waterway. Suppose this instrument was caught on one so-called side, would all parts of the rope be displaced, not alone what was caught, but also the part that crossed the Shannon, and the part that ran down on the other side? Would the whole apparatus come to or near to the surface of the water? Would the whole apparatus, rope, hooks, fish, and all, be towed, be dragged, in the wake of the entangled craft or vessel or boat up or down the river? As to how all this might affect navigation I decline in the most explicit and categorical way to determine. This is for the Commissioners alone. This is their exclusive function. It is admitted—in my opinion it could not be denied—that this contrivance, this device, is an engine. Well then, suppose it ranged not only for three miles and a-half along the Shannon, but from its source in Lough Allen down to within say a few miles from Limerick, and back again, a distance of over 300 miles, what would be the result? Is it to be excluded from the supervision of those to whom the "care," the manner of "using," the "regu-

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lation," and "management" of the river are entrusted. This would be a strong proposition; indeed in my opinion wholly unsustainable.

Once it (the contrivance or device) is an engine, supported in its position—and it must be admitted that it is supported in its position—then it is for the Commissioners exclusively to determine whether it is or may be injurious to navigation, and where, if at all, it may be placed in the river. The position in the river is really the all-important consideration, and this is for the Commissioners exclusively. This is their exclusive function—they alone have authority to determine this. This is the very matter of all others that the Legislature was anxious and careful about, viz., to take away from local tribunals—inexpert and, perhaps, prejudiced tribunals—the effect upon navigation of anything that comes within the description of the engine described in the by-law. And it is to be remarked, to be borne in mind, that the by-law is not confined to engines contrived for the purpose of fishing, but for any purpose whatsoever, which shows that it is not a purely fishery by-law which was the sole ground of impeachment in the first argument of this case.

So long as the matter about which the controversy arises is an *engine*, supported in its position, the question will be, "Is its use consistent with the proper 'using' of the Shannon?" What is its effect upon navigation? and where should it be placed in the river? And this question, as to its effect upon navigation and the proper using of the river, and as to its position in the river, was for the Commissioners exclusively. And, in my opinion, this was so for very many obvious reasons. Indeed, the magistrates themselves should rejoice that this question as to the effect of a particular engine and position in the river was taken from them, because I can understand the tremendous pressure which would be brought to bear locally upon magistrates in order to influence them to decide that a particular so-called engine, having regard to its nature and position in the river, was not injurious to navigation; and the popular disfavour which might, in some instances, ensue upon a decision that might in any way be considered to restrict a public claim of fishing. This, no doubt, occurred to the Legislature; and it is to be remembered that the Shannon and its navigation

were matters of national concern; and that, for the regulation of this navigation, and the improvement of the river, not merely one but several Acts of Parliament have been passed. It was not like other rivers, but it was a vast river of national concern, placed by Parliament in a category by itself, and treated by reason of its national importance with unique and especial care. By "especial" I mean it was not left to popular control and treatment, but had Commissioners and guardians of its own, who were vested with a paramount authority by reason of its importance; and so important, so much a matter of national concern, did Parliament think it, that it provided, even as regards vested rights, in the 44th section of 2 & 3 Vict. c. 61, that the ways and means of fishing should, in reference to navigation, be subject to the absolute control of the Commissioners. But, perhaps, I might say a word as to the apparent origin, the history, of the by-law. It was made in the year 1865, manifestly after the decision of *Hornsby* v. *Considine* (1) was given; and Mr. Justice Hayes, who was one of the two Judges who approved the by-law, was a party to that decision. That case was conversant with the 38th and 58th sections of the 2 & 3 Vict. c. 61. And it was held, at least by a majority of the Court, that the words "matter or thing" in the 38th section, did not include anchors or nets that were *movable*; that "matter or thing" were *ejusdem generis* with the antecedent words "weirs," &c., and meant things of a permanent character. Lord Fitzgerald, then Mr. Justice Fitzgerald, when dealing with the Attorney-General's contention that if movable engines such as frames, anchors, and nets were not within the 38th and 58th sections of the Act, the Shannon would be seriously impeded, is reported to have said:—"It was urged in argument, on section 58, by the Attorney-General, that a great public evil would ensue from supporting the decision of the Justices, as the Shannon might be covered with these engines. But the Commissioners have power under this section (s. 56) to make by-laws, and if they think this is a nuisance to navigation, to forbid it accordingly; and if I am right in my construction of section 38, there is nothing to prevent the Commissioners issuing a general order." This is the language

(1) 17 Ir. C. L. R. 660.

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of Lord Fitzgerald. There is, I think, in the report some inaccuracy as to the numbering of the sections. The suggestion, however, as to a by-law seems to have originated with him. Well, what did the Commissioners do? Did they, as Lord Fitzgerald said they might do, declare by a by-law that all frames and engines placed in the Shannon should be regarded as a nuisance? They did not, and, in not doing so, they acted in a most reasonable manner. Nothing, in my opinion, could be more unreasonable than to make such a cast-iron and sweeping provision. Everything depended upon the precise character of the particular instrument, and the particular place it was proposed to place it in the river. And most certainly it was competent for the Commissioners, who were the supreme, uncontrollable authority as to navigation and the using of the river, to make, in the interests of navigation, a by-law of a preventive efficacy; that is to say, a by-law which would require the sanction of the Commissioners before anything in the nature of the engine described was placed in the waters of the river. This prevented injury for the time being to navigation; prevented the delay and expense of removal; prevented possibly loss to the owner of the engine; and secured that the position in which the particular engine was proposed to be placed in the river should be unobjectionable, so far as the management of the river and so far as the navigation were concerned.

The using of any engine that was fixed, attached, supported in its position *whilst working*, though at other times movable, was to be subject to the sanction of the Commissioners. The objection founded upon mere movability which had prevailed was to be got rid of. Nothing could be more expedient, reasonable, and just than the by-law we are considering, If the Commissioners were to wait until an offending engine was placed in the river, and were then to direct its removal, injury might be done, expense incurred, and the process of removal might lead to tumult, riot, and, perhaps, bloodshed. The preventive by-law obviates all this, by enabling the Commissioners to sanction, or refuse to sanction, the placing in any part of the river of an engine of the kind described, that, in any particular spot, might, in their opinion, prove injurious to navigation.

It is competent for the Commissioners to grant or withhold

their sanction as to placing an engine of the kind described in the river; and, as I have said, the offence is placing the engine in the river without the prescribed sanction. It has been said that a riparian proprietor might be convicted for placing in the river an instrument which the Commissioners might subsequently consider or pronounce not injurious to navigation. This contention appears to me to ignore the character of the summons and the object of the by-law. The object of the by-law was to prevent placing in the river an engine which was obnoxious to the by-law; and which, if placed in any particular part of the river, might, in that part, interfere with navigation.

The duty of the Commissioners was, as Lord Fitzgerald said during the argument in *Hornsby* v. *Considine* (1), to keep the river clear for navigation; and, indeed, the by-law, which required an antecedent sanction by the Commissioners, was practically the only effectual means of discharging that duty. This preventive by-law, in my opinion, was essentially necessary to the due supervision, superintendence, and management, and the proper "using," of the river. It prevented the occurrence of mischief in the waters by preventing that which might cause it from being placed in the waters. It assured the detection of an instrument or engine which might do mischief to navigation before it had actually done it.

The great importance of the question involved, and the difference of opinion which exists, must be my apology for the length of my judgment. But to conclude. The by-law provides that it shall be unlawful to place an engine, supported in its position, in any part of the waters of the Shannon without the consent of the Commissioners. Upon this part of the by-law the summons in this case is founded. Preventive justice is invoked. Once it was admitted that what fulfilled the character of an engine such as described was put in the waters without the sanction of the Commissioners, as has been admitted in this case, an offence was committed, and the magistrates should have convicted. Instead of doing this, they did precisely what, in my opinion, they had no power to do: they considered the effect of the engine; they held it was not obstructive—a point which they had no jurisdiction to consider; they arrogated to themselves an authority

(1) 17 Ir. C. L. R. 660.

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which belonged exclusively to the Commissioners. The true question was this—this, and nothing else, Was an engine of the kind described used in the waters of the Shannon without the consent of the Commissioners? And when the magistrates went beyond this question, they plainly, in my opinion, exceeded their jurisdiction. I think the magistrates were manifestly wrong in their determination, and that the case should be sent back to them with a direction to convict. In dealing with the question of obstruction, in point of fact, they ignored the character of the complaint; they ignored the summons; and, in holding that the contrivance used was not an engine within the meaning of the by-law, they ignored the plain language of the by-law.

It may be that if the Commissioners of the Board of Works had been asked for permission to use this contrivance they would have granted it. But that is not the question with which we have to deal. Under this by-law, approved as it is by two of the Judges of a Superior Court, and the expediency and justice of which are, in my opinion, obvious, and the necessity for which, for the due supervision of the Shannon, is equally manifest, those who are the supreme authorities as to the navigation and user of the Shannon should have been consulted. They should have been permitted an opportunity of saying Yes, or No,—Yes; so far as navigation is concerned, it is unobjectionable in the position in which it is proposed to be placed; or, No (as the case may be); it would be, so far as navigation is concerned, objectionable in the position in which it is proposed to be placed.

But it is said that the by-law is unreasonable, on the ground that the Commissioners may prohibit the use of an engine without assigning any reason for the prohibition. But what does sanctioning, or not sanctioning, the use of a particular engine mean? In my opinion, plainly this, that "sanction or no sanction" is another way of stating that a particular engine is or is not injurious to navigation. This is the only question that can arise in respect of an antecedent sanction; and it is with reference to this question that the Commissioners are supreme, and are to say Yes or No. "Yes" means, as I have said, that there is not, so far as navigation is concerned, any objection to placing the engine in the river. "No" means that there is an objection, so

far as navigation is concerned, and we do not give our sanction. And as to any suggestion that the Commissioners—public officials, appointed by a public authority, and paid out of public funds, and responsible to the public through Parliament—would not, if asked, make plain the ground of their refusal, I decline to wreck a by-law that has been approved of by two distinguished Judges, and has worked well for over forty years, upon any such hypothesis. Indeed, I think that, wholly irrespective of compliance with the manifest obligations of official duty, the Commissioners, if they did refuse to disclose the grounds of their refusal, would be compelled by legal process to do so. It would be well, with a view to modification of an engine, or to change of position in the river, that the grounds of refusal should be known; but it is a very far-fetched thing, indeed, to suppose that all these matters would not be communicated by the Commissioners—quite an irrational hypothesis.

To conclude and sum up my judgment, I am of opinion that the by-law under consideration was made pursuant to the 56th section of the statute—the section which enables by-laws to be made: that is, was authorized by, and derives its binding effect from, that section; that it was fair by all it concerned, and was ideally adapted to enable the Commissioners effectually to do their duty—in the language of Lord Fitzgerald, "to keep the river free for navigation."

Solicitor for the Commissioners of Public Works: *W. G. Towers.*
Solicitor for the defendants: *James J. Kearns.*

J. L.

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HARRISON AND ANOTHER *v.* LUNDY (1).

Practice—Remittal of action—Time for serving notice of motion—Acceptance of service of writ by solicitor—Form of—Appearance—R. S. C. I. (1905, 22*nd February*), *Order IX, Rule* 1.

When service of a writ of summons is accepted by a defendant's solicitor in the following terms:—"I accept service of this writ on behalf of the defendant, and undertake to enter an appearance thereto," the time within which the defendant may move to have the action remitted to the County Court, under section 5 or 6 of the Common Law Procedure Act (Ireland), 1870, runs from the date of the entry of the appearance, and not from the date when service is accepted.

M'Farland v. *Lloyd* (30 L. R. Ir. 248) followed.

MOTION TO REMIT.

The action was brought by a husband and wife to recover damages for personal injuries caused to the latter by the negligence of the defendant. The writ of summons was issued on 30th August, 1909; and on 1st September the writ was sent to the defendant's solicitors, who on that day accepted service thereof in the following terms:—"We accept service of this writ on behalf of the defendant, and undertake to enter an appearance thereto." An appearance was entered for the defendant on 26th October, and on the same day a notice of motion to have the action remitted to the County Court was served. A statement of claim had been filed on 18th October.

When the motion came on for hearing, counsel for the plaintiffs objected that the motion was late.

W. G. Gibson, for the plaintiffs:—

Order IX, Rule 1, prescribes that "no service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance." In the present case

(1) Before ANDREWS, BOYD, and WRIGHT, JJ.

the defendant's solicitors, instead of "undertaking to accept" service, "accepted service" on his behalf on 1st September. I submit that where service of a writ is accepted in such terms the service is then complete for all the purposes of the action: see the judgment of Stirling, L.J., at pp. 478, 479, of the report of *In re Kerly, Son, & Verden* (1). In that case the service of the writ would not have been effectual unless the acceptance of service had been regarded as a complete service, not depending upon a subsequent entry of appearance. If an acceptance of service in such terms amounts to a complete service for all purposes, then the period prescribed by the Common Law Procedure Act (Ireland), 1870, sections 5 and 6, must run from the date when service was so accepted, and not from the date when an appearance is entered; and this motion is therefore late.

I admit that unless I can distinguish the present case from *M'Farland* v. *Lloyd* (2) I cannot sustain my objection, but I submit that the acceptance of service in that case differed from that in the present case. The report of *M'Farland* v. *Lloyd* (2) does not state explicitly the words in which service was accepted on behalf of the defendant; but it would seem from the report of the argument of counsel that the defendant's solicitor followed the words of Order IX, Rule 1, and "undertook to accept service"; if that be so, the decision does not rule the present case.

S. Hayes, for the defendant:—

I submit that *M'Farland* v. *Lloyd* (2) is a decision in my favour. The head-note of the report shows that service of the writ in that case was accepted in terms identical with those used by the solicitors for the defendant in the present case. They have followed the form suggested in Wylie's Judicature Acts and Rules of the Supreme Court: see the note to Order IX, Rule 1, at p. 210, which is the form generally adopted in practice.

ANDREWS, J.:—

If the acceptance of service in *M'Farland* v. *Lloyd* (2) was in the form indicated by the head-note of the report, then the

(1) [1901] 1 Ch. 467. (2) 30 L. R. Ir. 248.

K. B. Div. 1909.

HARRISON v. LUNDY.

Andrews, J.

present case cannot be distinguished from it. Mr. Gibson, however, contends that the words used in that case would seem from what counsel is reported to have stated to have been identical with those of Order IX, Rule 1. I shall, therefore, deal with the formula employed in the present case.

In my opinion, the solicitors for the defendant complied with the terms of Order IX, Rule I. The form which they adopted is equivalent to an undertaking to accept service and an immediate compliance with that undertaking. There has, therefore, been an equivalent to, and a compliance with, an undertaking to accept service within the meaning of Order IX, Rule 1; and in *M'Farland* v. *Lloyd* (1) a Divisional Court of the King's Bench has decided that, in such a case, service under Order IX, Rule 1, is not complete until an appearance has been entered, and that a defendant has, therefore, eight days from the date of entering his appearance within which to serve a notice of motion to remit the action.

We think that the present case is ruled by *M'Farland* v. *Lloyd* (1), and accordingly we shall hear the motion, which we hold to be in time.

BOYD and WRIGHT, JJ., concurred.

The motion was then heard and granted.

Solicitor for the plaintiffs: *A. L. Joynt.*
Solicitors for the defendant: *Hayes & Son.*

J. C. W.

(1) 30 L. R. Ir. 248.

THE KING (TAVERNER) *v.* JUSTICES OF COUNTY TYRONE (1).

K. B. Div. 1909. Nov. 4.

Justices —Bias —Churchwardens—Select Vestry—Conviction —Omission of statement whether imprisonment to be with or without hard labour—Imprisonment in default of payment of fine—Omission of words "unless fine and costs be sooner paid"—Defect in form of conviction brought about by defendant's conduct—Certiorari—*Discretion.*

In order to disqualify a Justice from adjudicating on the ground of bias, there must be a real likelihood of bias. The statement in the judgment of Lord Esher, M.R., in *Eckersley* v. *Mersey Docks and Harbour Board* ([1894] 2 Q. B. 667, at p. 671), that not only must Judges not be biassed, but that, "even though it be demonstrated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people —not necessarily reasonable people, but many people—would suspect them of being biassed," goes too far.

T. was charged on summons before the Justices at Petty Sessions with assault. The assault complained of arose out of a matter in which the churchwardens of a certain church were alleged to have been concerned. Two of the Justices who adjudicated were members of the select vestry of the church :—

Held, that these Justices were not disqualified from adjudicating.

T. was convicted of the assault and fined. The conviction provided that in default of payment of the fine and costs the defendant was to be imprisoned for seven days :—

Held, that the conviction was not bad for omitting to state whether such imprisonment was to be with or without hard labour.

Ex parte Thompson (24 J. P. 805) followed.

Held, also, that T. was not entitled to a writ of *certiorari* to quash the conviction on the ground that it omitted to add, after the award of imprisonment, the words "unless such fine and costs be sooner paid," it appearing that the omission of these words was brought about by a statement made on behalf of the defendant that the fine would be paid.

CERTIORARI.

The prosecutor herein was the defendant in a summons issued on the complaint of George Armstrong, charging the prosecutor

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and KENNY, JJ.

K. B. Div. 1909.

THE KING (TAVERNER) *v.* JUSTICES OF CO. TYRONE

with having assaulted the complainant. In an affidavit made by the prosecutor for the purpose of obtaining the conditional order hereinafter mentioned, it was stated that the charge arose in connexion with an attempt made by the Churchwardens of Fivemiletown Parish Church (one of whom was a brother of the complainant) to exclude the prosecutor from the church. That the prosecutor was a member of the church and of the select vestry, and that a pew which the prosecutor had occupied for a number of years had been allocated by the churchwardens to the complainant. That when the prosecutor was about to enter the church one of the churchwardens attempted to put him out, and during the struggle the prosecutor caught hold of the complainant's coat, which was the assault complained of.

The summons came on for hearing at Fivemiletown Petty Sessions, on the 2nd September, 1909, before a bench of five magistrates, of whom two, Mr. Montgomery (the Chairman) and a Mr. Lendrum, were members of the select vestry of Fivemiletown Church. At the beginning of the case it was suggested by counsel for the defendant that it might be better that any member of the Bench who was a member of the select vestry of the church should not adjudicate. Mr. Montgomery said he was a member of the select vestry, but that he could see no reason why he should not adjudicate, as the select vestry were not the complainants, nor had the summons been brought at their instigation; that it was purely a case of assault between two parties. Mr. Montgomery and Mr. Lendrum both adjudicated in the matter. Evidence was given, on which the Justices came to the conclusion that the defendant had assaulted the complainant. The defendant was convicted, and an order made to the following effect:—"Convicted of assault, and fined 10*s*., and 4*s*. costs, or in default to be imprisoned for seven days in Londonderry Jail."

The prosecutor obtained a conditional order for a writ of *certiorari* to bring up and quash the conviction on grounds substantially as follows:—(1) That the order imposed a term of imprisonment without allowing the defendant the option of determining such term by payment of the fine, the words "unless such fine and costs be sooner paid," or words to the like effect,

being omitted from the part of the order imposing the term of imprisonment. (2) That the term of imprisonment was not ordered to be with or without hard labour. (3) That the Justices, or some of them, were disqualified from adjudicating by reason of bias, two of the Justices being members of the select vestry of the church, in connexion with the administration of which the assault complained of was alleged to have taken place, and the complaint having been instituted at the instance of such select vestry.

Several affidavits were filed on behalf of the Justices by way of cause against making the conditional order absolute. Mr. Montgomery and Mr. Lendrum made affidavits denying that they were interested or biassed in the matter, and stating that the select vestry had not instigated the proceedings, and were not interested in them. The complainant in the summons also made an affidavit deposing that neither the select vestry, nor any member of it, had anything to do with the issuing of the summons; that deponent caused the summons to be issued, and prosecuted it himself. The Clerk of Petty Sessions made an affidavit stating that when he asked Mr. Montgomery, when writing out the order of conviction, to put in the alternative in case of non-payment of the fine, the prosecutor's counsel stated that the fine would be paid, and that the following day he asked the prosecutor should he issue a warrant, and in reply prosecutor told him his solicitor would call and pay the fine, which he did, remarking that he hoped paying the fine would not interfere with any further proceedings.

The present application was on behalf of the prosecutor to make the conditional order absolute, notwithstanding cause.

D. M. Wilson, K.C. (with him *Pringle*), for the prosecutor:—

We submit that the conviction should be quashed on three grounds—

(1) Mr. Montgomery and Mr. Lendrum, being members of the select vestry of this church, were disqualified from adjudicating. The alleged assault arose out of a dispute between the churchwardens and the prosecutor, and the churchwardens are a component part of the select vestry: Constitution of Church of Ireland, chap. 3, Art. 15. It is not necessary to prove actual bias.

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Even though it is demonstrated that the Justices would not be biassed, yet they ought not to act as Judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed: *Eckersley* v. *Mersey Docks and Harbour Board* (1), *per* Lord Esher, M.R. You cannot leave out of consideration the view the public may take: *Reg.* (*Burke*) v. *Justices of Galway* (2), *per* Palles, C.B.

(2) By section 42 of 24 & 25 Vict., under which the summons was brought, the Justices are empowered, in default of payment of any fine awarded under the section, to commit the offender to jail, to be imprisoned "with or without hard labour for any term not exceeding two months, unless such fine and costs be sooner paid." The conviction here does not specify whether the imprisonment is to be with or without hard labour, and is therefore bad on its face.

(3) The conviction is also bad on its face inasmuch as an absolute term of imprisonment is imposed instead of giving the defendant the option of determining the imprisonment by paying the fine and costs. The conviction should, after the award of imprisonment, have contained the words "unless such fine and costs be sooner paid": *R.* (*M'Erlean*) v. *Justices of Antrim* (3); *The King* (*Burke*) v. *Justices of Co. Cork* (4).

The fact that the fine has been paid cannot affect the prosecutor's rights to *certiorari*. The payment was made under protest, and without prejudice to prosecutor's rights. Where the applicant for a writ of *certiorari* is the party grieved, and is not merely applying as one of the public, he is entitled to the writ *ex debito justitiæ*: *The Queen* v. *Justices of Surrey* (5).

Henry, K.C., and *Calvert*, for the Justices:—

(1) The statement of the law as to bias quoted from the judgment of Lord Esher in *Eckersley* v. *Mersey Docks and Harbour Board* (1) goes too far in suggesting that the suspicions of

(1) [1894] 2 Q. B. 667, at p. 671.
(2) 31 I. L. T. R. 160.
(3) 2 New Ir. Jur. Rep. 256.
(4) [1902] 2 I. R. 309.
(5) L. R. 5 Q. B. 466.

unreasonable persons may be taken into consideration. Where, as in the present case, the interest of the Justice is not pecuniary, it must be substantial, so as to make it likely the Justice has a real bias. The mere possibility of bias is not sufficient. There must be a real likelihood of bias: Molloy's Justice of the Peace, p. 43; *The Queen* v. *Rand* (1); *The King* (*De Vesci*) v. *Justices of Queen's Co.* (2). In the present case there was no such real likelihood of bias. The select vestry have nothing to do with the assignment of pews in the church. The power to assign pews is vested in the churchwardens, with an appeal to the Ordinary: Constitution of Church of Ireland, Canon 43.

(2) Where in the conviction nothing is said as to hard labour, it is to be taken that the magistrates did not mean to give hard labour, and the conviction is not objectionable for omitting to state whether the imprisonment is to be with or without hard labour: Molloy's Justice of the Peace, p 161; *Ex parte Thompson* (3).

(3) Assuming the conviction to be defective by reason of the omission of the words "unless such fine and costs be sooner paid," the defect was caused by the statement of the prosecutor's counsel to the Clerk of Petty Sessions. In such case *certiorari* will not be granted: *The Queen* v. *South Holland Drainage Committee* (4).

No substantial benefit in the present case would accrue to the prosecutor by granting the *certiorari*, and therefore the Court in the exercise of its discretion should refuse it: *Reg.* (*Fisher*) v. *Justices of Co. Down* (5); *The King* (*M'Swiggan*) v. *Justices of Londonderry* (6).

Pringle, in reply:—

The omission to add the words "unless such fine and costs be sooner paid," cannot have been caused by the statement made to the Clerk of the Petty Sessions. If he had been influenced by that statement, he would have omitted all reference to imprisonment. A substantial benefit will accrue to the prose-

(1) L. R. 1 Q. B. 230.
(2) [1903] 2 I. R. 285.
(3) 24 J. P. 805.
(4) 8 E. & B. 429.
(5) 31 I. L. T. R. 8.
(6) [1905] 2 I. R. 318.

K. B. Dir. 1909.

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cutor by granting the *certiorari*, since it is a substantial injury to him to have a conviction for assault on record against him.

LORD O'BRIEN, L.C.J.:—

I think that the real question elaborated in this case was the question of bias. A passage has been cited from the judgment of a distinguished Judge, Lord Esher, in the case of *Eckersley* v. *Mersey Docks and Harbour Board* (1). He is reported to have said (pp. 670, 671)—"When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer, because he might be suspected of being biassed, although in truth he would not be biassed. It is an attempt to apply the doctrine which is applied to Judges, not merely of the Superior Courts, but to all Judges, that not only must they be not biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as Judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed." That, in my opinion, goes too far. It makes the mere suspicions of unreasonable persons a test of bias. I think that the judgment was not a considered one, and that Lord Esher made use of some loose expressions. We decline, on a consideration of the cases, to go so far as that very eminent Judge. There must, in the words of Blackburn, J., be a "real likelihood" of bias: *The Queen* v. *Rand* (2). In *The King* (*De Vesci*) v. *Justices of Queen's Co.* (3), I expressed myself as follows (p. 294):—"By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious." There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that there was such evidence in this case. Two of the Justices, Mr. Montgomery and Mr. Lendrum, were certainly members of the select vestry. I do not, however, think the mere fact that these two magistrates were members of the select vestry, and that the assault complained of arose out of a matter in which the

(1) [1894] 2 Q. B. 667.

(2) L. R. 1 Q. B. 230, at p. 233.

(3) [1908] 2 I. R. 285.

churchwardens are alleged to have been concerned, affords any evidence of a real likelihood of bias.

Another point raised is, that the conviction is bad because it is not stated whether the imprisonment is to be with or without hard labour. I do not think that there is any substance in this. If an adjudication is that the defendant be imprisoned, without more, this means that the imprisonment is to be without hard labour. Where hard labour is not part of the sentence, it need not be expressly negatived: *Ex parte Thompson* (1).

Then comes the question, is the conviction bad because it does not give the defendant the option of determining the term of imprisonment by payment of the fine, the conviction not containing the words "unless the said fine and costs be sooner paid"? We have a discretion as to granting this writ of *certiorari*, and we think that having regard to what took place at the trial, and at the making up of the order, we should not grant it in the present case. It appears that when the Petty Sessions Clerk was considering the form of order to be drawn up he was told that the fine would be paid, and was led to believe that the form of the order was a matter of indifference. If there is a defect of form, it was really brought about by the defendant's counsel, and therefore, in the exercise of our discretion, we refuse to grant *certiorari*.

On these grounds we refuse the motion with costs.

GIBSON, MADDEN, and KENNY, JJ., concurred.

Solicitor for the prosecutor: *W. F. M'Coy.*
Solicitor for the Justices: *M. E. Knight.*

J. G. T.

(1) 24 J. P. 805.

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AUDITOR—*continued.*
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BY-LAW—*Approval of two Judges of the High Court* — Ultra vires — *Unreasonableness* — *River Shannon—Navigation—Fisheries—Frame or engine*—Ejusdem generis.] The Shannon Navigation Act, 1839 (2 & 3 Vict. c. 61), by its 37th section, enacted that the care and conservancy of the River Shannon shall be vested exclusively in the Commissioners for the execution of the Act; and, by its 56th section, enacted that "it shall and may be lawful for the Commissioners . . . to make such rules, orders, regulations, and by-laws, as to them shall seem meet and proper for regulating the conduct of all officers, &c., and for the well and orderly using and preserving the said River Shannon, . . . and for regulating the passing and re-passing of all ships, . . . and such by-laws, rules, and orders shall be binding upon, and shall be observed by, all persons whatsoever, and shall be sufficient in all Courts of Law and Equity to justify all persons who shall act under the same; provided that such by-laws, rules, and orders be approved of by any two Judges of any of Her Majesty's Superior Courts of Record in Dublin." The powers of the Commissioners appointed for the execution of the Act subsequently became vested in the Commissioners of Public Works in Ireland. On the 9th August, 1865, the Commissioners of Public Works made the following by-law;—"It shall not be lawful for any person or persons, without the sanction of the Commissioners of Public Works in Ireland (such sanction to be signified in writing under the hands of the said Commissioners for that purpose), to place in any part of the River Shannon any frame or engine for catching eels, or any other fish, or for any other purpose, whether such frame or engine be fixed in the soil of said river, or attached to any anchor, or be otherwise supported in its position. And any person offending against this by-law shall forfeit the sum of five pounds for each such offence." On the 10th August, 1865, approval of the foregoing by-law was endorsed thereon by Chief Justice Lefroy and Mr. Justice Hayes. At Petty Sessions for a district adjoining the Shannon, John M. and James M. were charged in and by a certain summons, for that they, without the sanction of the Commissioners of Public Works in Ireland, signified in writing under the hands of the Commissioners for that purpose, did unlawfully place in a part of the River Shannon an engine for catching eels, supported in its position with stones attached thereto, contrary to the statute and by-law. The engine used was an eel-line, a mile and a half or three-quarters in length on each side, with stones attached at intervals of 40 yards, and about twelve to twenty hooks between each stone. The line was paid out from a boat, and laid at the bottom of the river. Upon the dismissal of the complaint by the Justices, a case was stated for the opinion of the Court:—*Held*, by a majority of the Court (Dodd, Wright, Johnson, and Andrews, JJ., and Palles, C.B.), that the by-law was *ultra vires*. *Held*, by Madden, J., and Lord O'Brien, L.C.J., that the by-law was *intra vires*. *Held*, by Madden and Johnson, JJ., that

BY-LAW—*continued.*
the contrivance in question was not a frame or engine within the meaning of the by-law *Held*, by Andrews, J., Palles, C.B., and Lord O'Brien, L.C.J., that the contrivance was a frame or engine within the meaning of the by-law. *Commissioners of Public Works* v. *Monaghan* - K.B. 718

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CASES—*Annaly* v. *Comyn* (30 L. R. Ir. 102), not followed - - - - - 500
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—— *Attorney-General* v. *Robinson* ([1901] 2 I. R. 67) explained - - - - - 597
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—— *Connor* v. *Butler* ([1902] 2 I. R. 569) followed - - - - - - 490
See FOOD.
—— *Dewar* v. *Goodman* ([1908] 1 K. B. 94) distinguished - - - - - 58
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—— *Lethbridge* v. *Attorney-General* ([1907] A. C. 19) followed - - - - 597
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—— *Mehaffey* v. *Mehaffey* ([1905] 2 I. R. 292) discussed - - - - - 1
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—— *R.* (*Hinds*) v. *Estates Commissioners* ([1909] 2 I. R. 258) discussed and followed by Walker, C., *diss.* Fitz Gibbon, L. J., and *dub.* Holmes, L. J. - - 542, 556
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—— *Reece* v. *Dublin United Tramways Co.* ([1909] 2 I. R. 15, 16 (n)) followed - 13
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CERTIFICATE—Of analyst—Given in another proceeding - - - - - 490
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COMPOSITION — After bankruptcy—Provable debt - - - - - - 185
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COMPULSORY PURCHASE—*Acquisition of land under Labourers Acts — Jurisdiction of Local Government Board arbitrator — Agreement as to compensation—Labourers Act*, 1906, *sections* 5, 6, 31 *—Labourers (Ireland) Order*, 1906, *Rule* 60 (1).] Where proceedings are taken by a District Council to acquire lands under the Labourers (Ir.) Act, 1906, s. 6, a valid agreement as to the compensation to be paid and abatements of rent to occupying tenants may be entered into between the Council and all the persons interested in any particular plot of ground proposed to be taken. Such agreement may be entered into at any time before adjudication by the arbitrator, and does not require the sanction of the Local Government Board, under Rule 60 (1) of the Labourers (Ireland) Order, 1906. After such an agreement has been entered into, and the arbitrator is informed of it, he has no jurisdiction to make an award deciding that amounts different from those agreed upon should be paid for compensation or abatement of rent. Rule 60 (1) either does not apply to proceedings under section 6, or is *ultra vires*. *The King (Crommelin)* v. *O'Neill* - - - APP. 379
—— Evicted Tenants Acts - 258, 542, 556
See EVICTED TENANT. 1, 2.

CONDITION — Bond — Breach of — Action for
See BOND. [655, 667, 670
—— Exercise of compulsory powers under Evicted Tenants Acts — Offer to purchase under sect. 1 of Act of 1907 - - 258
See EVICTED TENANT. 1.

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CONTINUING PROCEEDINGS — *Practice—Judgment in default of appearance—Lapse of a year from service of writ — Notice of intention to proceed —Service of—R. S. C. I.* (1905, 22*nd February*), *Ord. LXIV, Rule* 15; *Ord. LXVII, Rule* 5.] Where no appearance has been entered to a writ of summons, endorsed for a liquidated sum, in an action in the King's Bench Division, and a year has elapsed since the service of the writ, filing in the Notice Office a month's notice of intention to proceed with the action does not constitute notice sufficient to entitle the plaintiff to enter final judgment for the amount due. *Provincial Bank* v. *Phelan* - - - - - - K. B. 698

CONTRACT—*Action of—Practice—Staying proceedings — Agreement to refer matters in dispute to English Court.*] A contract made between the Corporation of L., in Ireland, and C. & Co., Ltd., a Company having its registered office in England, and carrying on business there, contained a clause that the contract should "in all respects be construed and operate as an English contract, and in conformity with English law." The contract was made in Ireland, and the works to be done under it were to be erected there. An action for damages for breach of the contract having been instituted in the Irish Court by the Corporation of L. against C. & Co., on a motion by C. & Co. to stay all further proceedings in the action:—*Held*, by the King's Bench Division, that, as the parties had agreed to refer all questions arising under the contract to an English tribunal, the action should be stayed. *Mayor, &c. of Limerick* v. *Crompton* [K. B. 120 [Aff.]
—— Basis of—Fidelity bond - - 700, 712
See GUARANTEE.

CONTRIBUTION—Repair of sea-wall—Covenant running with land - - 58
See COVENANT. 2.

CONTRIBUTORY NEGLIGENCE—Particulars - - - - - - 181
See PARTICULARS.

CONVICTION—Fine and costs, in default imprisonment—Omission of direction in alternative as to whether or not hard labour was imposed — Omission of the words "unless such fine and costs be sooner paid"—Omission caused by statement of defendant - - - - - 763
See JUSTICES. 2.

CORK—County of—Ridings—Clerk of Crown and Peace - - - - - - 412
See REGISTRAR OF TITLES.

COSTS—Action which could have been brought in County Court—Bond in penal sum—Damages recoverable under £50
See BOND. [655, 670
—— Motion for final judgment—After close of pleadings - - - - - 500
See JUDGMENT.
—— Varying judgment as to - - - 667
See BOND.

COUNTY—Ridings - - - - 412
See REGISTRAR OF TITLES.

COUNTY COUNCIL—*Petition of Right—Grant from Parliament—Moneys of the subject in the hands of the Crown—"The King can do no wrong"—Irish Land Act*, 1903—*Losses on the flotation of stock—Land Purchase Account—Constituent parts of Guarantee Fund—Development Grant—Death Duty Grant—Agricultural Grant—Order in which recoupment of flotation losses to be borne—Purchase of Land (Ireland) Act*, 1891—*Local Government (Ireland) Act*, 1898, *ss.* 48 (1) (2), 49—*Labourers (Ireland) Act*, 1906, *s.* 15—*Lord Lieutenant—Treasury Rules.*] In the financial years ending 31st March, 1906, and 31st March, 1907, there had been deducted from the grants to County Councils in Ireland the sum of £73,218 12*s.* 5*d.*, being the sum of £65,677 12*s.* 4*d.* deducted from the Death Duty Grant, and the sum of £7541 0*s.* 1*d.* deducted from the Agricultural Grant. From the shares of these grants to which the County Council of K. was entitled, the deductions made were—for the year 1906, the sum of £1698 0*s.* 3*d.*, and for the year 1907, £6766 12*s.* 6*d.*, making together the sum of £8464 12*s.* 9*d.*, whereof £2957 8*s.* 3*d.* had been withdrawn from the Death Duty Grant, and the sum of £5507 4*s.* 6*d.* from the Agricultural Grant. These deductions had been made in pursuance of certain statutory provisions of the Land Purchase (Ireland) Acts, enabling deductions to be made from the grants for the purpose of recouping losses incurred in the working of the finance of the Land Purchase Acts. The County Council of K. filed a Petition of Right, in which it was submitted that these deductions were illegal, and not authorized or warranted by the Land Purchase (Ireland) Acts, or any statutory or legal authority. The deductions were made on the ground that under sect. 29 (2) of the Irish Land Act, 1903, the Guarantee Fund was liable to make good any deficiency in the income account of the Irish Land Purchase Fund, and that, so far as these deficiencies were caused by the issue of Guaranteed Land Stock at a discount, the Irish Development Grant, as one of the constituent parts of the Guarantee Fund, was first to be charged, under section 38 of the Act of 1903, so long as it was able to meet them; but that there were other deficiencies in the income account with which the Local Taxation Grants, as constituents of the Guarantee Fund, were directly chargeable, and that these deficiencies arose from the following causes:—(1) arrears from the payment of purchase annuities, £9119; (2) unearned dividends in issue of stock, £23,750; (3) advance dividends, £13,650; (4) interest due but not received, £15,500; (5) unproductive balances, £8977. The petition took exception to items (2), (3), and (5) of the foregoing deductions, and charged that the Development Grant had not been duly applied under the provisions of the Irish Land Act, 1903, but had been devoted to other purposes, with

COUNTY COUNCIL—*continued.*

the result that the Death Duty Grant and the Agricultural Grant had been improperly charged with sums which should have been paid primarily out of the Development Grant portion of the Guarantee Fund. It was also submitted that the dividends and sinking fund on two millions of "excess stock," issued to make good the loss occasioned by the Guaranteed Land Stock being issued at a discount, if chargeable at all against the Land Purchase Fund or Gurrantee Fund, should be made good out of the Development Grant before the Death Duty Grant and Agricultural Grant could be resorted to. It was further submitted that the sum of £50,000 payable out of the Irish Development Grant to the income account of the Irish Land Purchase Fund for the financial year ending March 31, 1907, had been improperly withdrawn therefrom, and that up to March 31, 1905, a sum of £156,000 had been paid from the Irish Development Grant into the income account of the Irish Land Purchase Fund, under the provisions of section 38 of the Irish Land Act, 1903; according to a statement of the Secretary of the Treasury, the unexpended balances of money from the Irish Development Grant should, under the provisions of section 15 of the Labourers Act, 1906, be used as a working balance, and should not be reckoned as part of the income of the Land Purchase Fund in determining whether that income was sufficient, under section 29 (2) of the Irish Land Act, 1903. The sum of £98,000, the amount of the working balance, included the sum of £50,000 payable from the Development Grant for the financial year ending March 31, 1907, and it was submitted that this sum was not, upon the true construction of section 15 of the Labourers (Ireland) Act, so applicable, and out of the sum of £98,000 only such portion thereof (if any) as represented meneys transferred from the Irish Development Grant prior to March 31, 1906, and which remained then unexpended, were applicable for the purpose of such working balance, and all moneys payable or paid from the Development Grant, under section 38 of the Irish Land Act, 1903, after March 31, 1906, should have been paid to, and reckoned as forming part of, the income account of the Irish Land Purchase Fund. It was further submitted that Statutory Rules 10 and 23 of the 24th November, 1904, were *ultra vires* and void; that the whole of the Death Duty Grant should be exhausted before the Agricultural Grant was resorted to, and that there was no power, after the closing of the accounts for the financial year ending March 31, 1906, to re-open them, and charge the County Councils with any of the deficiencies:—*Held*, that the suppliants' right to the moneys was founded upon grant, and not upon contract; but that the moneys were, nevertheless, the moneys of the suppliants in the hands of the Crown, and were a

COUNTY COUNCIL—*continued.*
proper subject of Petition of Right. The principle that the King can do no wrong is no answer to a Petition of Right to recover from the servants of the Crown moneys to which the suppliants are entitled under a grant. *Held*, also, that section 6 (6) of the Purchase of Land (Ireland) Act, 1891, by which all questions arising as to the share of any county, &c., in any fund or sum dealt with in that Act shall be dealt with by the Lord Lieutenant, did not preclude the Court from determining the questions raised by the Petition. *Held*, also, that none of the objections in the Petition could be sustained; that upon the meaning of the word "deficiency" in section 38 of the Irish Land Act, 1903, the entire capital loss incident to the issue of stock at a discount might be met by the creation of stock, instead of paying it out of the Irish Development Grant, so far as it would stand; that the deductions under the heads of "Unearned Dividends on Stock" and "Advance Dividends" were duly authorized; that under the head "Unproductive Balances," if there were default by the servants of the Crown, the same could not be imputed to the Sovereign, so as to make them an appropriate subject-matter for a Petition of Right; that the objection to the validity of the Treasury Rules was not maintainable, and that the £50,000 payable out of the Development Grant for the financial year ending 31st March, 1907, was properly appropriated as part of the "working balances" specified in section 15 of the Labourers (Ireland) Act, 1906, and not as part of the income account of the Irish Land Purchase Fund. *Kildare County Council* v. *The King* - - - K.B 199.

—— District Lunatic Asylum — Committee of management—Appointment of medical officer—Mandamus - - 276, 284
See DISTRICT LUNATIC ASYLUM.

COUNTY COURT — *Practice — Interpleader—Civil Bill by a third party claiming goods taken in execution — Time within which such proceedings must be taken*—14 & 15 *Vict. c.* 57, *s.* 150.] In interpleader proceedings, under 14 & 15 Vict. c. 57, s. 150, brought against an execution creditor by a person claiming as his property goods taken under a decree, order, or process of a Civil Bill Court, the claimant's civil bill against the execution creditor must be returnable to the first place where Quarter Sessions are held in the division where the goods were seized, and for which the civil bill can be served in due time, after the date when the affidavit and money mentioned in section 150 of the said Act have been lodged with the sheriff by the claimant. The decision of Andrews, J., in *Legge* v. *Neill* (23 Ir.L.T.R. 20) followed. *Clifford* v. *Piggott* - - - - K.B. 589 [Aff.]

2. —— *Undefended ejectment for non-payment of rent—Affidavit of amount of rent due—Proof of tenancy—Proof of character of tenancy—Landlord and Tenant (Ireland) Act* (1860) (23 & 24 *Vict. c.* 154) *s.* 52—*Civil Bill Courts Procedure Amendment Act (Ireland)*, 1864 (27 & 28 *Vict. c.* 99), *s.* 46—*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *s.* 7—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 12.] The plaintiff in an undefended civil-bill ejectment for non-payment of rent is not entitled to a decree for possession merely on proof of service of the civil bill and lodgment of an affidavit showing that upwards of a year's rent is due. Proof must also be given of the contract of tenancy. *Quære*: Whether, where, from the form of the civil bill, it appears that execution must be as provided by section 7 of the Land Law (Ireland) Act, 1887, evidence is necessary to prove that the holding is agricultural or pastoral, or partly agricultural and partly pastoral. *Semble*: In a case within section 12 of the Land Law (Ireland) Act, 1896, where more than one person is in possession, proof is necessary as to the character of the possession of each such person. *Congested Districts Board* v. *Curry* - - - - K.B. 503

—— Action which could have been brought in—Bond—Amount recoverable - 655, 670
See BOND.

—— Decree—Renewal—Affidavit - - 290
See RENEWAL OF DECREE.

—— Remitting action to
See REMITTING ACTION TO COUNTY COURT.

COVENANT — *Landlord and tenant — Lease—Construction of—Exclusion of implied by express covenant.*] In 1903 the plaintiff demised to the defendant Company certain lands for a term of years, subject, as to part of the lands, to a weekly tenancy created therein by the plaintiff, together with "all the right, benefit, and advantage" of the plaintiff, under a memorandum of agreement by which the said tenancy had been created. By the said memorandum of agreement the payment of the weekly rent had been guaranteed by two sureties; but prior to 1903 the sureties had been released by the plaintiff. During the negotiations for the lease of 1903, a copy of the said memorandum of agreement was sent to the defendant Company, but the release of the sureties was not disclosed by the plaintiff, nor was any requisition in relation to the contract of suretyship made by the defendant Company. The lease contained an express covenant by the plaintiff for quiet enjoyment, which did not make any reference to the said contract of suretyship. The defendant Company, having failed to recover the said weekly rent from the tenant, sued the sureties, who successfully relied on their release by the plaintiff. In an action by the plaintiff against the defendant Company for rent due under the lease of 1903, the

COVENANT—*continued.*
defendant Company counterclaimed for damages for breach of contract to assign to them the full benefit of the said contract of suretyship, and for non-disclosure of the discharge of the sureties, but abandoned any claim founded on fraudulent concealment or misrepresentation :—*Held*, that the presence in the lease of the above-mentioned express covenant negatived the existence of any implied covenant or warranty that, at the date when the lease was executed, the contract of suretyship was still valid and subsisting, even assuming that such a covenant could otherwise have been implied from the terms of the lease: as to which, *quære*. *Murphy* v. *Bandon Co-operative Agricultural and Dairy Society* K.B. 510 [Aff.]

2. —— *Landlord and tenant—Lease—Covenant by lessee to contribute to repair of sea-wall—Liability of assignee of lessee—Covenant running with the land—Agreement incident to tenancy—Landlord and Tenant (Ireland) Act*, 1860 (23 & 24 *Vict. c.* 154), *s.* 12.] A lease of lands near the sea contained a covenant by the lessee, that if it became necessary to rebuild or repair a certain sea-wall the lessee, his executors, administrators, or assigns, would contribute a certain proportion of the expenses incurred. The sea-wall was not parcel of the demised premises, but lay between them and the sea, and was necessary to protect the subject-matter of the demise from encroachment by the sea, and ultimate destruction:—*Held*, that the covenant ran with the land, and bound an assignee of the lessee. *Dewar* v. *Goodman* ([1908] 1 K. B. 94; W.N., 1908, p. 250) distinguished. *Held*, also, by Lord O'Brien, L.C.J., and Gibson and Kenny, JJ., that, even if the covenant did not run with the land in the strict sense, the effect of section 12 of the Landlord and Tenant (Ireland) Act, 1860, was to make the assignee liable. *Lyle* v. *Smith*, - - - - - - - - K.B. 58

—— Applicable to statutory tenancy - 690
See FAIR RENT.

—— To build—Proviso that lease should be void, and that lessee should hold for shorter term at original rent - - - 436
See SUCCESSION DUTY.

—— To deliver up possession—Surrender 474
See SURRENDER.

—— To repair—Bankruptcy of covenantor—Composition—Continuing breach - 185
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CRIMINAL LAW—Assault — Justices — Adjournment—Civil action pending 400
See JUSTICES. 1.

—— Conviction—Defect in caused by conduct of defendant - - - - - 763
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CRIMINAL LAW—*continued.*
—— Food and Drugs Act—Analyst's certificate—Given in another proceeding - 490
See FOOD.

—— Medical Act, 1858, s. 40—Right of member of public to prosecute - - 681
See MEDICAL ACT.

DAMAGES—Breach of covenant to repair — Bankruptcy of covenantor - - 185
See BANKRUPTCY. 2.

DATE—Amendment of particulars at trial — Adjournment refused - 445, 469
See NEW TRIAL.

DEATH DUTY GRANT—County Council — Deductions - - - - - 199
See COUNTY COUNCIL.

DEBT— Bankruptcy — Damages for breach of covenant to repair— Non-assessment — Bankruptcy Act, 1872, s. 46 - 185
See BANKRUPTCY. 2.

DECREE—County Court—Renewal - 290
See RENEWAL OF DECREE.

DEDUCTIONS—Parliamentary grants to County Council - - - - - - 199
See COUNTY COUNCIL.

DEFAULT OF APPEARANCE — Lapse of year—Procedure to mark judgment 698
See CONTINUING PROCEEDINGS.

DESERTION—Of wife—49 & 50 Vict. c. 52—Nature of proceedings under—Stipendiary magistrate—Summons—Service — Jurisdiction - - - - - - 302
See JUSTICES. 3.

DEVOLUTION OF TITLE—Registered owner —Proof of will - - - - 53
See PARLIAMENT. 1.

DISCRETION OF COURT—Certiorari 354, 369
See DISPENSARY DISTRICT.

DISPENSARY DISTRICT—*Alteration of—Poor Law—Medical Charities Act*, 1851 (14 & 15 *Vict. c.* 68), *sect.* 6—*Local Government Board—Requisition to Guardians — Sealed Order — Certiorari—Discretion of Court.*] Although it is a condition precedent to the power of the Local Government Board to make a sealed order for the alteration of the existing dispensary districts of a poor law union that they should first require the Guardians to alter such districts, subject to the approval or disapproval of the Board, and that the Board should either disapprove of the alteration proposed by the Guardians, or that the Guardians should neglect to make any alteration when required, such requisition need not be in any particular form, and any formal defect in it may be waived by the conduct of the Guardians. To found the jurisdiction of the Board to alter the districts by sealed order, it is sufficient if what,

DISPENSARY DISTRICT—*continued.*
under all the circumstances of the particular case, is a substantial requisition to the Guardians to do so has, in fact, been first made. A Poor Law Union consisted of four dispensary districts, A, B, C, and D. Both the Guardians and the Local Government Board were in agreement that some alteration should be made; and an inquiry was held by an inspector of the Board, at which several Guardians and others gave evidence, and propounded their views as to the most suitable plan of re-arrangement. The Guardians on the 25th April, 1908, passed a resolution that five dispensary doctors would be necessary, but that they would only agree to the appointment of the extra doctor on condition that two electoral divisions specified in the resolution, one in B and the other in C, should be made the centres of two re-arranged districts. The Local Government Board, on the 29th May, wrote a lengthy letter to the Guardians, discussing the various plans put forward, approving of the appointment of the fifth doctor and of the centres, as proposed by the Guardians' resolution. The letter concluded—"In pursuance of section 6 of the Act 14 & 15 Vict. c. 68, the Board have now formally to require the Guardians to alter the A, B, and C dispensary districts, and to form instead, four new dispensary districts, as follows—B, C, E, and F," specifying the electoral divisions of which each was for the future to consist. The Guardians, on the 4th July, passed a resolution stating that they considered that the proposal made by the Local Government Board in regard to the re-arrangement of A dispensary district "is too ridiculous to be for a moment entertained, and they persisted in sticking to the resolution of the 25th April last; and when the Local Government Board sanction same, the Guardians will then propound their scheme." The Local Government Board then, without any further communication, issued a sealed order for re-arrangement of the districts. The order declared that one medical officer and one midwife should be appointed for each district, with qualifications as prescribed by any sealed order for the time being in force, provided that the medical officer or midwife holding office in three of the existing districts should respectively continue to hold such office for three of the new districts, as specified in the order. On application by the Guardians for a *certiorari* to quash the sealed order:—*Held*, by the Court of Appeal, affirming the judgment of the King's Bench Division, that the sealed order was valid; that the letter of the 29th May was a sufficient requisition to the Guardians, under the 6th section of the Medical Charities Act, 1851, to alter the districts; and that, notwithstanding the imperative language in the concluding part of

DISPENSARY DISTRICT—*continued.*
the order, it was open to the Guardians to formulate an alternative scheme, and that the resolution of the 4th July was, in substance, a refusal by the Guardians to do so, which had the effect of waiving any informality in the requisition, and the necessity of making any further requisition; further, that the provision as to medical officers and midwives did not invalidate the order. *Per* Gibson, J.; The provision, if in itself bad, was severable. *Per* Kenny, J.: The provision was redundant and superfluous. The alteration of dispensary districts does not affect the status of medical officers attached to the district before alteration. *Held*, also, by the King's Bench Division, that the Court, in its discretion, should refuse *certiorari* under the circumstances of the case. *The King* (*Guardians of Castlerea Union*) v. *Local Government Board* K.B. 354; APP. 369

DISTRICT LUNATIC ASYLUM—*Resident Medical Superintendent—Temporary appointment—Joint Committee of Management — Mandamus — "Proceeding"—Local Government* (*Ireland*) *Act*, 1898, *ss.* 9, 84—*Lunacy* (*Ireland*) *Act*, 1867, *s.* 6.] A Joint Committee of Management of a District Lunatic Asylum have no power to make a temporary appointment of a resident medical officer, *e.g.*, for twelve months only. Mandamus lies against a Joint Committee for the appointment of a duly qualified resident medical officer after the lapse of a reasonable time after a vacancy in the office has occurred. *The King* (*Courtenay*) v. *Joint Committee of Management of the Carlow District Lunatic Asylum* - - K.B. 276; APP. 284

DUBLIN METROPOLITAN POLICE DISTRICT—Divisional Justice—Summons—Service—Jurisdiction - - 302
See JUSTICES. 3.

EJECTMENT.
See ACTION TO RECOVER POSSESSION OF LAND.

ELECTION — Local Government — Petition — Alleged to have been presented prematurely - - - - 90, 103
See ELECTION PETITION.

ELECTION PETITION—*Local Government—Rejection of nomination paper—Petition presented between day of nomination and day fixed for election in case of contest—Whether premature—Waiver by respondent.*] At an election to fill two vacancies on a Rural District Council, *A*, *B*, and *C* were nominated as candidates on the 28th April, the County Council having previously fixed the 27th May as the day for election. The returning officer rejected *A*'s nomination paper, and on the 15th May, *A* presented a petition to set aside the election of *B* and *C*. *B* entered an appearance by solicitor on the 25th June. Notice of trial was

ELECTION PETITION—*continued.*
served on the 12th June for the 25th June. When the trial came on before the Commissioner duly appointed by the Judges on the Rota, *B.*, without having made any application to the Divisional Court to stay the proceedings, to dismiss the petition, or for a writ of prohibition, appeared before the Commission by counsel, who objected that the petition was premature, having been presented before the date of the election, which, he contended, was the 27th May, and that the Commissioner had no jurisdiction to try the case; but cross-examined the petitioner's witnesses, and went into evidence on *B.*'s behalf:—*Held*, without deciding whether the 28th April or 27th May was the day of the election, and assuming the petition to have been presented prematurely, this would not have the effect of nullifying the proceedings, but was an irregularity capable of waiver, and which had been, in fact, waived by *B.* The judgment of the King's Bench Division affirmed by the Court of Appeal. *In re Grangemellon* (*Co. Kildare*) *Election Petition* - - K.B. 90; APP. 103

ESTATE DUTY — *Revenue — Policies of life assurance—"Interest purchased or provided by the deceased"—Finance Act*, 1894 (57 & 58 *Vict.* c. 30), *ss.* 1, 2, *sub-s.* 1 (d).] Under the trusts of a marriage settlement, made in 1853, a wife became entitled for her life to the income of the settled property for her separate use, with a restraint on anticipation. In 1861 the wife verbally agreed with her husband, who had effected a policy of assurance on his life in 1859, that she would every year pay to him the income to which she was entitled under the settlement of 1853, when received by her, to be applied by him in paying the premiums on the said policy, and on any additional policies on his life which he might thereafter effect as their family increased, the object being that the wife should make provision for herself and her children after her husband's death. At the date when the said agreement was made there were four years' arrears of the wife's said income in the hands of the trustees of the settlement of 1853; and, in order to recoup the husband for the premiums already paid by him on the policy of 1859, the amount of the wife's said income for the two preceding years was, by her written order, paid to her husband by the trustees, the remaining arrears being added to the capital of the trust funds. From that date down to the husband's death in 1906 (except in the year 1896, when the income for that year was added to the capital of the trust funds) the wife's said income, when it reached the hands of the trustees, was, by her written order, paid by them to her husband for the purposes aforesaid. During the years 1861-1876 the husband, in pursuance of the agreement of 1861, effected five additional policies of assurance

ESTATE DUTY—*continued.*
on his life. All the above-mentioned policies were kept up and became payable on his death. It was proved that the husband never was obliged to draw on his own resources for the purpose of paying the premiums on the said policies, as he was always in the position of having received more from his wife than he had paid in premiums, though he was never asked to account for the balance, and apparently used it for his own purposes. By an indenture made in 1887, which recited that the husband was "entitled to" the said policies, which were set forth in a schedule, the husband assigned them to trustees, upon trust for his wife for life, and after her death for the children or remoter issue of marriage, as he should appoint; and in default of appointment, for the said children in equal shares; and the husband thereby covenanted with the trustees to pay the premiums on the said policies. The wife was not a party to this deed, nor was any power of appointing the proceeds of the said policies given her thereby; and, though she knew of the execution of the said deed, she apparently did not understand its legal effect. By deed-poll subsequently executed, the husband varied the powers of investment contained in the said deed of 1887, and modified, in regard to one of his children, the trusts therein declared; and by another deed-poll, in exercise of a power of appointment given him by the settlement of 1853, he directed that the property settled thereby should be held upon the trusts declared in the deed of 1887; but the agreement of 1861 was not altered, and the manner in which the aforesaid payments were made to the husband, and the premiums on the said policies paid by him, continued as it had been prior to the execution of the said deed of 1887. The wife survived the husband, and on the death of the latter, estate duty on the proceeds of the said policies was claimed and paid. On a petition of appeal, under the Finance Act, 1894, section 10, by the husband's executors to recover the amount of the estate duty so paid by them. *Held*:—(1) that, having regard to the substance of the transaction, rather than to the conveyancing form adopted to carry it out, the inference suggested by the deed of 1887 was insufficient to rebut the other evidence in the case, and that, by virtue of the agreement of 1861 and the payments made thereunder, the policies became the separate estate of the wife. (2) That the real, as distinguished from the nominal, liability assumed by the husband by the deed of 1887 could have become effective only in the event of his surviving his wife, or in the event of the premiums on the said policies exceeding at any time the amount of his wife's moneys in his hands primarily applicable thereto; and that as neither event had happened, the policies had not been to any extent purchased or

ESTATE DUTY—*continued.*
provided by him within the meaning of section 2, sub-section 1 (*d*), of the Finance Act, 1894. *Lethbridge* v. *Attorney-General* ([1907] A. C. 19) followed. *Attorney-General* v. *Robinson* ([1901] 2 I.R. 67) explained. *Quære*: Whether the policies were impressed with any binding trust for the children of the marriage. *Semble*: They were not. *Richardson* v. *Commissioners of Inland Revenue* - - - - - - K.B. 597

ESTATES COMMISSIONERS — Compulsory powers—Jurisdiction - 258, 542, 556
See Evicted Tenant. 1, 2.

EVICTED TENANT—*Estates Commissioners—Voluntary offer to purchase—Compulsory purchase—Evicted Tenants (Ireland) Act*, 1907 (7 *Edw.* 7, *c.* 56), *sections* 1 *and* 2.] The Estates Commissioners are not bound to make an independent offer to the owner, under section 1 of the Evicted Tenants (Ireland) Act, 1907, as a condition precedent to putting in operation the machinery for the acquisition of land compulsorily under section 2 of that Act. Madden, J., *diss.* *The King* (*Hinds*) v. *Estates Commissioners*; *The King* (*Collins*) v. *Same* - - - K.B. 258

2. —— *Evicted Tenants* (*Ireland*) *Acts*, 1907, 1908 — *Compulsory purchase — Petition against acquisition without further inquiry—Tenanted land—Consent—Estates Commissioners—Excess of jurisdiction—Prohibition—Waiver.*] The Estates Commissioners published in the *Dublin Gazette* notices under the Evicted Tenants (Ireland) Act, 1907 (7 Edw. 7, c. 56), s. 2, sub-s. 1, for the compulsory acquisition of lands of which *C.* was owner. Two of these stated that in so far as the lands were tenanted, the tenants had signed consents, filed as a record under the Evicted Tenants (Ireland) Act, 1908 (8 Edw. 7, c. 22), s. 1. They were in other respects in the form in the schedule to the Provisional Rules of the 24th October, 1907. No previous offer to purchase the lands had been made. *C.* lodged objections to the acquisition of the lands on the grounds, *inter alia*, that the consents obtained from tenants were invalid, and reserving the right to make all legal objections by petition. The Commissioners subsequently made offers to purchase the lands in two divisions, one for £17,187, and the other for £11,180, each offer reciting that no objection appearing to the Commissioners to be valid had been raised to such acquisition. Thereupon *C.* presented a petition in respect of each offer, in which he prayed that the lands might not be acquired compulsorily without further inquiry. In the petition he relied on the objections lodged, and further alleged that the conditions precedent to the compulsory acquisition of the lands had not been complied with. The petitions having come on for hearing before the Commissioners, *C.*

EVICTED TENANT—*continued.*
appeared by counsel. It appeared that a large portion of the lands to which each offer related were in the occupation of tenants answering the description in the proviso in sub-section 3 of section 1 of the Act of 1907, and, in the opinion of the Court, the documents alleged to be consents were not consents within the meaning of the Act of 1908. Counsel for *C.* objected to the Commissioners proceeding further, on the ground, *inter alia*, that, under the circumstances, the Commissioners had no jurisdiction to acquire the lands compulsorily. The Commissioners announced their intention of submitting certain questions of law for the determination of the Judicial Commissioner. *C.'s* counsel declined to take any part in the settlement of such questions; and before any questions were settled or submitted to the Judicial Commissioner, and before the Estates Commissioners had determined any questions arising on the petitions, *C.* obtained, on the 26th February, 1909, conditional orders for writs of prohibition, prohibiting the Commissioners from taking further proceedings for the compulsory acquisition of the lands. These orders were amended on the 4th May, 1909. On motion to make the conditional orders absolute:—*Held*, by the King's Bench Division (Palles, C.B., and Andrews, J.; *diss.* Johnson, J.), and by the Court of Appeal, that *C.* was entitled to have the orders made absolute, on the grounds—*Per* Palles, C.B. (with whom Andrews, J., concurred), that the Commissioners, without evidence sufficient to prove that the lands comprised in their offers to purchase were lands which they had jurisdiction to purchase, overruled *C.'s* objection, which insisted on that absence of jurisdiction, and that *C.* had not waived his right to prohibition by presenting his petitions or otherwise. *Held*, by Johnson, J. (who on other points concurred in the judgment of Palles, C.B.), that *C.* had lost his right to prohibition by presenting the petitions. *Held*, by the Court of Appeal, that once it appeared by evidence on the hearing of the petitions, that the lands in each offer were partly tenanted by persons coming within the proviso in section 1 (3) of the Act of 1907, from whom valid consents had not been obtained under the Act of 1908, and the Commissioners, notwithstanding, persisted in continuing the proceedings, *C.* was entitled to prohibition. *Held*, by the Lord Chancellor (*diss.* FitzGibbon, L.J., and *dub.* Holmes, L.J.), that the decision of the majority of the King's Bench Division in *The King* (*Hinds*) v. *Estates Commissioners* (*ante*, p. 258) was right; but *held*, by the Lord Chancellor and Holmes, L.J. (*diss.* FitzGibbon, L.J.), that *C.* had waived the necessity (if such existed), of an independent offer under sect. 1 (1) as a condition precedent to compulsory acquisition. *Held*, by Lords Justices FitzGibbon and Holmes (*diss.* the

EVICTED TENANT—*continued.*
Lord Chancellor), that the Commissioners, in deciding, under sect. 2 (4) of the Act of 1907, on the validity of objections lodged, are acting judicially; and (following *In re Hind's Estate*, 43 L. T. R. 75) their decision is appealable, or if they overrule such objections without notice to the objector, or hearing any evidence offered in support of the objections, prohibition may issue. *The King* (*Marquess of Clanricarde*) v. *Estates Commissioners* [K.B. 542; APP. 556

EVIDENCE—Claim—Parliamentary franchise—£5 freeholder—Devolution of title from testate registered owner—Proof of will—Local Registration of Title Act, 1891 53
See PARLIAMENT. 1.

—— Claim — Parliamentary franchise — Relevant to claim as stated, but showing different qualification - - - - - 48
See PARLIAMENT. 2.

—— Negligence—Absence of—Injury to passenger on railway—Hand crushed by shutting of door - - - - - - 330
See NEGLIGENCE. 2.

—— Negligence—Railway Company — Defective fence—Turntable - - - - 499
See NEGLIGENCE. 1.

—— Original will — Punctuation, capital letters, and parentheses - - - 521
See REVOCATION OF WILL.

—— Prosecution under Food and Drugs Acts — Member of public—Analysis - 490
See FOOD.

—— Undefended civil bill ejectment — Non-payment of rent - - - - - 503
See COUNTY COURT. 2.

EXCESS OF JURISDICTION — Inferior tribunal — Estates Commissioners—Prohibition - - - - - 542, 556
See EVICTED TENANT. 2.

EXCLUSION — Of implied covenant — Express covenant—Lease - - - - 510
See COVENANT. 1.

EXECUTION OF POWER—Will—Construction—Punctuation in original will 521
See REVOCATION OF WILL.

EXPRESS COVENANT — Excluding implied covenant or warranty - - 510
See COVENANT. 1.

FAIR RENT — *Land Law* (*Ireland*) *Act*, 1881, *s.* 21 — *Land Law* (*Ireland*) *Act*, 1887, *s.* 1 — *Covenants consistent with a statutory tenancy.*] A lease, made in 1873, contained the following recital and covenant:—"And whereas the said John Archbold, the lessee, has deposited with the said William Bell, the lessor, at the time of the execution hereof, a sum of £200 as security for the due

FAIR RENT—*continued.*
payment of the rent hereby reserved, and the performance of the covenants herein contained, and which it has been agreed shall be allowed to the said John Archbold, his executors, administrators, or assigns (if permitted to assign), in liquidation of the rent of the premises hereby demised last accruing before the determination of the said term, provided the several clauses and covenants in these presents contained shall have been, up to the surrender of the premises hereby demised, faithfully observed and performed, he, the said William Bell, doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said John Archbold, his executors, administrators, and assigns, that he, the said William Bell, his heirs, executors, administrators, and assigns, shall and will pay to, or allow out of the rent hereby covenanted to be paid by, the said John Archbold, his executors, administrators, or assigns, interest during the continuance of this demise upon the sum of £200 at the rate of £5 per cent. per annum from the date of these presents; and at the end of the said term, or other sooner determination of this demise, shall and will apply and set off the said sum of £200 in liquidation and discharge of the previous year's rent hereby reserved of the premises hereby demised, provided that the said several clauses and covenants shall have been faithfully observed and performed." A "fair rent" having subsequently been fixed upon the holding, and there having been a devolution of the interest of both lessor and lessee:—*Held*, that the covenant was applicable to the statutory tenancy so created in the holding, and that the tenant was entitled to deduct from the judicial rent payable by him the interest payable to him on the said sum of £200 under the covenant. *Bell* v. *Archbold* K.B. 690

FENCE — Defective condition — Railway Company—Negligence - - - 499
See NEGLIGENCE. 1.

FIDELITY BOND — Representations as to course of business - - 700, 712
See GUARANTEE.

FISHERY ACTS—*Possession of salmon in close season — Salmon caught by net in close season for netting, but open season for angling* — 5 & 6 *Vict. c.* 106, *s.* 36.] It is an offence under sect. 36 of 5 & 6 Vict. c. 106, for a person to expose for sale, or have in his custody or possession, salmon caught by net during the close season for net-fishing, notwithstanding that at the time of his exposing them for sale, &c., angling for salmon by rod and line is lawful. *King, Appellant*; *Russell, Respondent* [K.B. 25

FOOD—*Food and Drugs Acts*, 1875, 1899 (38 & 39 *Vict. c.* 63; 62 & 63 *Vict. c.* 51)—*Prosecution by member of public—Analyst's certificate—Certificate obtained in another proceeding.*] *P.*, a retail dealer

FOOD—*continued.*
in milk, had been successfully prosecuted for selling adulterated milk, which she had innocently purchased from *B.*, a wholesale dealer in milk. She then prosecuted *B.*, giving in evidence the certificate of analysis which had been used in the prosecution against herself, but not any certificate of analysis made on her own behalf. No copy of any certificate of analysis was served on *B.* with the summons:—*Held*, on motion to make absolute a conditional order for *certiorari*, that the conviction could not be sustained. *Guardians of Enniskillen Union* v. *Hilliard* (14 L. R. Ir. 214) and *Connor* v. *Butler* ([1902] 2 I. R. 569) followed. *The King* (*Barry*) v. *Mahony* - - K. B. 490

FRANCHISE—Parliamentary - - 48, 53
See PARLIAMENT. 1, 2.

FRAUD—Judgment - - - - 1
See SETTING ASIDE JUDGMENT.

GAME-COVER—Malicious injury to—Compensation - - - - 125
See MALICIOUS INJURY. 1.

GRANT—Parliamentary—Money in the hands of the Crown—Petition of right - 199
See COUNTY COUNCIL.

GUARANTEE—*Fidelity bond—Basis of contract—Representations in answer to queries—Default of principal—Absence of negligence by employers to which loss could be traced—Guarantors not discharged.*] The defendants were sureties under a bond, conditioned for the faithful performance of his duties by a collector of poor-rate employed by the plaintiffs. The rate-collector made default, and in an action upon the bond against the defendants, to recover the amount of the rate-collector's default, the defendants pleaded that, in a proposal forming the basis of the contract embodied in the bond, the plaintiffs had warranted that the course of conduct prescribed by the Public Bodies Order, 1904, Articles 93, 96, 97, and 100, as to the fortnightly auditing of rate-collector's accounts, would be strictly followed by the plaintiffs; the defendants also pleaded that representations to the same effect had been made by the plaintiffs to the defendants, and that the latter had been thereby induced to execute the bond. At the trial the defendants proved that the plaintiffs had in certain details departed from the course of conduct prescribed by the above-mentioned Articles of the said Order, but they failed to prove that the rate-collector's default was traceable to any act or neglect on the part of the plaintiffs or their officers. At the trial judgment was given for the plaintiffs for the full sum claimed. On a motion by the defendants for judgment, or for a new trial:—*Held*, by the King's Bench Division and by the Court of Appeal, that, as the rate-collector's default was

GUARANTEE—*continued.*
not attributable to any failure on the part of the plaintiffs to carry out the provisions of the said Order, the alleged warranty and representation, even assuming that they had been made by the plaintiffs, afforded no defence to the action. *Donegal Co. Council* v. *Life and Health Assurance Association* - - K. B. 700; APP. 712

—— Rent of sub-tenant—Lease—Warranty or covenant - - - - - 510
See COVENANT. 1.

GUARANTEE FUND—Land Purchase Act, 1891—Land Act, 1903 - - 199
See COUNTY COUNCIL.

GUARDIANS—Poor Law—Alteration of dispensary district - - 354, 369
See DISPENSARY DISTRICT.

HEDGES—Adjoining public road—Order to prune - - - - - - 686
See JUSTICES. 5.

HIGHWAY.
See ROAD.

HUSBAND AND WIFE—Desertion of wife—Summons—Service - - - 302
See JUSTICES. 3.

IMPLIED COVENANT—Exclusion by express—Lease—Construction - 510
See COVENANT. 1.

IMPLIED REPEAL—Statute - - 290
See RENEWAL OF DECREE.

INCORPOREAL HEREDITAMENT—Compensation—Malicious injury - 125
See MALICIOUS INJURY. 1.

INEVITABLE ACCIDENT—Contributory negligence—Particulars - - 181
See PARTICULARS.

INFANT—Trespasser—Railway Company—Evidence of negligence - - 499
See NEGLIGENCE. 1.

INFORMATION—Malicious injury—Mortgagee not in possession—Agent - 674
See MALICIOUS INJURY. 2.

INJURY TO PASSENGER—Negligence—Railway—Shutting door of carriage
See NEGLIGENCE. 2. [330

—— Negligence—Tramcar - - - 13
See TRAMWAY.

INSURANCE.
See POLICY OF INSURANCE.

INTENTION TO PROCEED—Default of appearance—Lapse of a year - 698
See CONTINUING PROCEEDINGS.

INTERPLEADER—Civil bill—Sessions
See COUNTY COURT. 1. [589

IRISH DEVELOPMENT GRANT—Land Act, 1903, s. 38 - - - 199
See COUNTY COUNCIL.

IRREGULARITY—Election petition—Alleged to be presented prematurely—Waiver
See ELECTION PETITION. [90, 103

JOINT COMMITTEE OF MANAGEMENT—District Lunatic Asylum — Appointment of medical officer—Mandamus 276, 284
See DISTRICT LUNATIC ASYLUM.

JUDGMENT—*Practice—Motion for final judgment after delivery of defence and after pleadings closed by default of reply—Order XIV.—Costs.*] An application for final judgment may be made after joinder of issue in default of reply, and judgment may be entered for the plaintiff, on terms indemnifying the defendant against costs incurred by him owing to the plaintiff's delay, when the defendant is not otherwise prejudiced by such delay. *Annaly* v. *Comyn* (30 L. R. Ir. 102) not followed. *Tottenham* v. *Foley* - APP. 500

—— After a lapse of years—Month's notice of intention to proceed - - - 698
See CONTINUING PROCEEDINGS.

—— Motion for—Specially endorsed writ—Ejectment—Arrears of rent - - 104
See SPECIALLY INDORSED WRIT.

—— Setting aside—Fraud—Issue - - 1
See SETTING ASIDE JUDGMENT.

—— Varying—Bond—Costs - - - 667
See BOND.

JURISDICTION—Contract to refer matters in dispute to English Court — Service of writ and of jurisdiction - - 120
See CONTRACT.

—— Divisional magistrate—Dublin Metropolitan Police District - - - 302
See JUSTICES. 3.

—— Estates Commissioners — Evicted Tenants Acts - - - 258, 542, 556
See EVICTED TENANT. 1, 2.

—— Fraud on creditors — Setting aside judgment - - - - - 1
See SETTING ASIDE JUDGMENT.

—— Local Government Board — Alteration of Dispensary districts - - 354, 369
See DISPENSARY DISTRICT.

—— Local Government Board—Labourers Acts—Acquisition of land—Arbitrator - 379
See COMPULSORY PURCHASE.

JUSTICES—*Adjournment—Summons for assault—Civil action pending — Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 20.] *M.* was charged on summons before Justices at Petty Sessions with having assaulted *B.* and *C.*: *Held*, that the Justices had no power to adjourn the hearing on the ground that a civil action was pending by *M.* against *B.* and *C.* for an alleged assault arising out of the same transaction as that dealt with by the summons. *The King* (*Deeny*) v. *Justices of Tyrone* - - - - K.B. 400

JUSTICES—*continued.*

2. —— *Bias—Churchwardens—Select Vestry—Conviction—Omission of statement whether imprisonment to be with or without hard labour—Imprisonment in default of payment of fine—Omission of words "unless fine and costs be sooner paid"—Defect in form of conviction brought about by defendant's conduct*—Certiorari—*Discretion.*] In order to disqualify a Justice from adjudicating on the ground of bias, there must be a real likelihood of bias. The statement in the judgment of Lord Esher, M.R., in *Eckersley* v. *Mersey Docks and Harbour Board* ([1894] 2 Q. B. 667, at p. 671), that not only must Judges not be biassed, but that, "even though it be demonstrated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people — would suspect them of being biassed," goes too far. *T.* was charged on summons before the Justices at Petty Sessions with assault. The assault complained of arose out of a matter in which the churchwardens of a certain church were alleged to have been concerned. Two of the Justices who adjudicated were members of the select vestry of the church:—*Held*, that these Justices were not disqualified from adjudicating, *T.* was convicted of the assault and fined. The conviction provided that in default of payment of the fine and costs the defendant was to be imprisoned for seven days:—*Held*, that the conviction was not bad for omitting to state whether such imprisonment was to be with or without hard labour. *Ex parte Thompson* (24 J. P. 805) followed:—*Held*, also, that *T.* was not entitled to a writ of *certiorari* to quash the conviction on the ground that it omitted to add, after the award of imprisonment, the words "unless such fine and costs be sooner paid," it appearing that the omission of these words was brought about by a statement made on behalf of the defendant that the fine would be paid. *The King* (*Taverner*) v. *Justices of Tyrone* - K.B. 763

3. —— *Dublin Divisional Justice—Jurisdiction to issue summons for service outside Dublin Police district—5 & 6 Vict. c.* 24, *s.* 49—"*Stipendiary Magistrate*" — *Married Women* (*Maintenance in case of Desertion*) *Act*, 1886 (49 & 50 *Vict. c.* 52).] A Divisional Justice of the Dublin Metropolitan Police District has jurisdiction, in respect of any matter summarily determined by him, and arising within such district, whether of a civil or criminal nature, to issue a summons for service on a defendant anywhere in Ireland. *Great Southern & Western Railway Co.* v. *Leyden* ([1907] 2 I. R. 160) distinguished. The expression "Stipendiary Magistrate" in sect. 1 of the Married Women (Maintenance in case of Desertion) Act, 1886, includes a Divisional Justice of the Dublin

JUSTICES—*continued.*
Metropolitan Police district. Proceedings under the last-mentioned Act are of a civil nature. *Quære*: Does the decision in *Great Southern & Western Railway Co.* v. *Leyden* ([1907] 2 I. R. 160) apply to proceedings under that Act in Petty Sessions districts outside the Metropolitan Police district? *The King (Redding)* v. *Swifte* - K.B. 302

4. —— *Practice—Case stated under 20 & 21 Vict. c. 43—Service on opposite party.*] A copy of a case stated by Justices, under 20 & 21 Vict. c. 43, and notice of the appeal, were served on the solicitor who had appeared for the respondent before the Justices. The respondent had disappeared from the country, and every reasonable effort had been made to serve him personally, but without success: —*Held*, that the service was sufficient to give the Court jurisdiction to hear the case. *Clarke, Appellant*; *M'Guire, Respondent* - K.B. 681

5. —— *Public road—Hedges and trees injuring road—Order directing owner of lands to prune—Subsequent order authorizing road contractor to do the acts—Summary Jurisdiction (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 92), *section* 9.] The scheme of section 9 of the Summary Jurisdiction (Ireland) Act, 1851, is that there shall be, first, an order that the defendant shall comply with the notice served on him by the county surveyor or road contractor; and a second order, if the first be not complied with, that the county surveyor or contractor may do all or any of the acts ordered by the first order. The second order may be less extensive than the first, but it cannot be more extensive. *Semble*: Such first order should not contain a provision that the work thereby required to be done is to be completed to the satisfaction of the county surveyor. *The King (Winder)* v. *Justices of Kildare* - - - - - K.B. 686

—— Licensing Acts—Transfer - - 132
See LICENSING ACTS. 2.

—— Prosecution under Food and Drugs Acts—Analyst's certificate—Member of public
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LAND LAW (IRELAND) ACTS—Covenant consistent with statutory tenancy 690
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—— Evicted Tenants Acts—Compulsory purchase — Offer — Petition — Estates Commissioners—Excess of jurisdiction—Prohibition - - - - - 542, 556
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—— Evicted Tenants Acts—Offer under sect. 1 of Act of 1907—Whether a condition precedent to exercise of compulsory powers - - - - 258
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LAND LAW (IRELAND) ACTS—*continued*
—— Undefended civil bill ejectment — Proofs - - - - - 503
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LANDLORD AND TENANT—Bankruptcy of tenant—Landlord's right to six months' rent - - - - - 114
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—— Ejectment on notice to quit—Arrears of rent—Judgment on motion - 104
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—— Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.

—— Lease.
See LEASE.

—— Undefended civil bill ejectment—Non-payment of rent—Proofs - - 503
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LEASE — Covenant applicable to statutory tenancy - - - - - 690
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—— Covenant running with land—Repairs to sea-wall - - - - - 58
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—— Covenant to build—Reduced term on breach at same rent — Whether rack-rent — Expiration—Succession duty - 436
See SUCCESSION DUTY.

—— Covenant to repair—Bankruptcy of lessee—Non-assessment of damages—Bankruptcy Act, 1872, s. 46—Composition - 185
See BANKRUPTCY. 2.

—— Implied covenant—Exclusion by express 510
See COVENANT. 1.

—— Public-house—Surrender by lessee—Letting to new tenant—Transfer of license 132
See LICENSING ACTS. 2.

—— Surrender — Delivery up of possession — Breach of covenant—Damages - 474
See SURRENDER.

LICENSING ACTS—*General business on licensed premises—Structural separation—Saturday night—Sunday—Intoxicating Liquors (Ireland) Act*, 1906 (6 *Edw. 7, c.* 39), *s.* 2.] Section 2 of the Intoxicating Liquors (Ireland) Act, 1906, provides, *inter alia*, "Where any business, other than the sale of intoxicating liquors, is carried on in the licensed premises, the whole of such premises shall be closed at the hours aforesaid, unless the portion of the same in which such sale of intoxicating liquors is carried on is structurally separated from the remainder of the building." *Held*, by a majority of the Court (Lord O'Brien, L.C.J., Palles, C.B., and Andrews, J., dissenting), that the words "hours aforesaid" in the foregoing provisions are not restricted to closing hours on Saturday nights, but mean prohibited hours generally. *Rowan* v. *Downing* - - K.B. 626

LICENSING ACTS—*continued.*

2. —— *Surrender of interest in licensed premises by lessee — Letting to another tenant* — Ad interim *order made at Petty Sessions—Transfer refused at Quarter Sessions on the ground that new tenant had no interest in the license*—"*Transfer of license,*" *meaning of* — 6 *Geo.* 4, *c.* 81, *s.* 21—18 *& 19 Vict. c.* 114, *s.* 1 — 37 *& 38 Vict. c.* 69, *s.* 12.] On the 12th June, 1902, *M. M. & Co.* made a lease to *M.* for fifty years of a licensed house and premises, and *M.* having continued to occupy the same in the meantime as a licensed publican, obtained, at the licensing sessions of October, 1907, a certificate entitling her to receive a publican's license, in pursuance of which she took out in her own name a license for the premises from the 10th October, 1907, to the 10th October, 1908. On the 23rd January, 1908, *M.* surrendered the premises and license to *M. M. & Co.* A fresh letting was then made by *M. M. & Co.* (by means of a written agreement, unstamped) to *L.*, who duly obtained on the 8th February, 1908, a Petty Sessions order for an *ad interim* transfer of the license to her. *L.* subsequently, deciding not to take the premises, signed the license, and handed the same back to *M. M. & Co.* On the 21st April, 1908, *M. M. & Co.* made a further letting to *D.*, and handed him over possession of the premises and of the license. On the 25th April following, *D.* applied for and obtained a Petty Sessions order for an *ad interim* transfer of the license to him, and on the 17th June applied to the Quarter Sessions for a certificate to entitle him to receive a transfer of a license to sell beer, &c., "at his house formerly in the occupation of *L.*" This was refused, the Chairman of the Quarter Sessions holding that *D.* had no interest in the license. *D.* applied for and obtained a conditional order for a *certiorari* to quash the said adjudication, and while the proceedings in relation thereto were pending in the King's Bench Division, *D.* applied at the October Sessions for a transfer and confirmation of the license "lately held by *M.*," and also applied in the alternative for a new license. The Chairman of Quarter Sessions entered "no rule" on the application for a transfer and confirmation, and adjourned the application for a new license to the next Sessions to give time to have the proceedings in the King's Bench Division disposed of. *D.* obtained a second conditional order for a *certiorari* to quash the latter adjudication, and the two cases were argued together:—*Held*, by Lord O'Brien, L.C.J., and Madden, J., that there was no authority in the Petty Sessions to grant the *ad interim* transfer on the 25th April, 1908, there being neither removal, sale, nor assignment within the meaning of 6 Geo. 4, c. 81, sect. 21, or of the 18 & 19 Vict. c. 114, sect. 1; that when *D.* came before the Quarter Sessions on the 17th June with

LICENSING ACTS—*continued.*

an application for a transfer, what he relied upon was an unauthorized license or authority from the Petty Sessions which was in no way binding on the Quarter Sessions; and that the Chairman was right in holding that at that date *D.* had no interest in the license:—*Held*, also, that when *D.* came before the Quarter Sessions in October, with an application for a transfer and confirmation, there was nothing to transfer or confirm, and that the Chairman was right in his adjudication, both as to the application for a transfer and the application for a new license. *Per* Lord O'Brien, L.C.J.: If the application at Quarter Sessions, as distinguished from that at Petty Sessions, was for a transfer of *L.'s* so-called license, she was not a duly licensed person, and whatever she had she allowed to lapse. *Held*, by Gibson, J., that the possession of an interim protection order from Petty Sessions, or of a temporary license under section 12 of the Act of 1874, formed no part of *D.'s* qualification to apply for a transfer at the October Sessions; that *D.*, under his lease, represented derivatively *M.'s* interest by assignment or upon removal: that his application at October Sessions, in the absence of statutory objection, should have been granted, and that "no rule" was an invalid adjudication, and should be quashed; but that, as no legal advantage could result to *D.* from quashing the June adjudication, the conditional order in respect thereof should be discharged:—*Held*, by Kenny, J., that *D.* had such an interest in the premises and license as constituted him a transferee within the meaning of the transfer sections of the Acts; that his claim need not be based upon a direct and immediate dealing with a licensed person, and that he was entitled to his certificate at both June and October Sessions. The meaning of "transfer of license" discussed. The Court refused the application with reference to the order made in June, Kenny, J., dissenting; and, being equally divided as to the application relating to the October order, made no rule. *The King* (*Duggan*) v. *County Court Judge of Fermanagh* - - - - - K.B. 132

LOCAL GOVERNMENT—Alteration of Dispensary District—Sealed order 354, 369
See DISPENSARY DISTRICT.

—— Auditor — Illegal or unfounded payments—Accounting persons—Negligence or misconduct - - - - - - 333
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—— County Council — Parliamentary grants — Deductions—Petition of right - 199
See COUNTY COUNCIL.

—— District Lunatic Asylum—Medical officer—Committee of management 276, 284
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LOCAL GOVERNMENT—*continued.*
—— Election petition—Alleged prematureness—Waiver - - - - - 96, 103
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—— Labourers Acts — Arbitration — Agreement as to price—Sanction of Local Government Board - - - - - 379
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—— Malicious injury—Game cover - 125
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—— Malicious injury — Mortgagee not in possession—Information - - - 674
See MALICIOUS INJURY. 2.

LOCAL REGISTRATION OF TITLE ACT—£5 freeholder — Claim as devisee of registered owner—Proof of will 53
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—— Local Registrar of Titles—Clerk of the Crown and Peace—County Cork—Ridings 412
See REGISTRAR OF TITLES.

LUNATIC ASYLUM.
See DISTRICT LUNATIC ASYLUM.

MALICIOUS INJURY—*Game cover—Incorporeal hereditament—Injury to—Compensation—Local Government (Ireland) Act*, 1898, *sect.* 5—*Malicious Damage Act*, 1861, *sect.* 16—*Grand Jury (Ireland) Act*, 1836, *sect.* 137.] Lands were demised for a term of years, under a lease which reserved to the lessor, and his heirs and assigns, all game on the lands, and the right to enter upon the lands to search for, kill, and carry away game. During the continuance of the lease a quantity of heather and grass upon the demised lands, forming a game cover, was maliciously burned, but not so as to injure the leasehold reversion. On an application for compensation by the owner of the reversion, under section 5 of the Local Government (Ireland) Act, 1898:—*Held*, that the applicant was not entitled to compensation in respect of the injury to his incorporeal right. *Lord Ashtown, Applicant*; *County Council of Waterford, and Clonmel R.D.C.* (*No.* 2), *Respondents* - - - - - - - - APP. 125

—— *Mortgagee not in possession—Claim for compensation—Premises burned by mortgagor—Conviction for arson—Agent—Information—"Servant having the care of the property"—6 & 7 Wm.* 4, *c.* 116, *s.* 137.] *A*, owner in fee of premises on which buildings were erected, mortgaged them to *B*, since deceased, of whom *C* and *D* were executors. Neither *B*, *C*, nor *D* was in possession of the premises prior to the destruction of the buildings. *E* acted as agent for *C* and *D* in effecting an insurance on the premises, and paying the premiums thereon; had communications on their behalf with *A* as to payment of interest on the mortgage, and acted as their agent in winding up *B*'s estate. *A* set fire to the buildings in order to fraudulently claim the amount of an insurance which he had effected thereon, and was convicted of the offence. *E* made the information on which a claim by *C* and *D* for compensation for the destruction of the buildings was based:—*Held*, that *E* was not "the servant of *C* and *D* having the care of their property injured" within the 137th section of 6 & 7 Wm. 4, c. 116, and that, therefore, the claim could not be sustained. *Query*: Could *C* and *D* have sustained the claim on an information sworn by themselves? *Smith and another, Applicants*; *County Council of Tyrone, Respondents*; *Omagh Rural District Council, Appellants* - - - - - - APP. 674

MANDAMUS—Joint committee of management of District Lunatic Asylum — Local Government (Ireland) Act, 1898, ss. 9, 84 [276, 284
See DISTRICT LUNATIC ASYLUM.

MASTER AND SERVANT—Workmen's Compensation Act—Nature of employment
See WORKMAN. [108

MEDICAL ACT—(21 & 22 *Vict. c.* 90), *s.* 40—*Right of member of public to prosecute for offence.*] Any member of the public may institute proceedings under section 40 of the Medical Act, 1858. *Clarke, Appellant*; *M'Guire, Respondent* - K.B 681

MEDICAL OFFICER — District Lunatic Asylum—Temporary appointment 276,
See DISTRICT LUNATIC ASYLUM. [284

MILK — Adulteration—Prosecution by member of public—Analysis - - - 490
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MISCONDUCT — Accounting persons — Local Government Act, 1902, s. 20 - 333
See AUDITOR.

MORTGAGE — Mortgagee not in possession — Premises burned by mortgagor—Agent—Information—Claim for compensation
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MOTION FOR JUDGMENT—After close of pleadings - - - - - - 500
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—— Ejectment on notice to quit—Arrears of rent
See SPECIALLY INDORSED WRIT. [104

NAVIGATION — Obstruction to — Frame or engine—By-law, whether *ultra vires* 718
See BY-LAW.

NEGLIGENCE — *Railway Company—Defective fence—Infant trespasser—Invitation to danger—Turntable.*] On appeal to the House of Lords from the judgment of the Court of Appeal ([1908] 2 I.R. 242), that judgment was reversed and the judgments of Lord O'Brien, L.C.J., and of the King's Bench Division were restored. *Cook* v. *Midland Great Western Railway of Ireland.* [H.L. 499

2. —— *Railway Company — Injury to passenger—Hand crushed by shutting of door — Cause of*

NEGLIGENCE—*continued.*

action—Remitting to County Court.] The plaintiff, a young girl, who was intending to emigrate to America, entrained at a station on the defendant Company's line *en route* to Queenstown. As the train was about to start she was saying good-bye to her friends from the door of the carriage, when a porter in the Company's service pushed two newly-arrived passengers past her. While the plaintiff had her hand at the side of the door, the porter opened it to introduce these passengers, and before she had time to withdraw her hand he shut the door, crushing the plaintiff's hand, and causing severe injuries to her. The train was in motion when this occurred. On motion to remit the action for trial to the County Court:—*Held*, affirming the decision of the King's Bench Division, that the action should be remitted, as no cause of action was shown. *Taylor* v. *Great Southern and Western Railway Co.* - - - App. 330

—— Contributory—Pleading—Particulars 181
See Particulars.

—— Of accounting persons—Local Government Act, 1902, s. 20 - - - 333
See Auditor.

—— (*a*) Of passenger; (*b*) of driver; (*c*) of conductor—Tramcar - - - 13
See Tramway.

NEW TRIAL—*Practice—Amendment of date in particulars—Surprise—Refusal of adjournment in order to supply evidence adapted to altered date.*] Where a specific date is given by a plaintiff in particulars, to which, under the circumstances of the case, the defendant may reasonably confine his evidence, an amendment of the date should not be allowed at the trial without granting (if applied for) an adjournment, to allow the defendant an opportunity of supplementing his evidence, so as to meet the case presented by the amended date. *M'Carthy* v. *Fitzgerald* - K.B. 445; App. 469

NOTICE TO QUIT — Ejectment—Arrears of rent—Final judgment - - 104
See Specially Indorsed Writ.

OBJECTIONS — By landowner to compulsory purchase under Evicted Tenants Acts
See Evicted Tenant. 2. [542, 556

OCCUPATION — Successive — Power to amend claim - - - - - - 48
See Parliament. 2.

OFFICIAL SAMPLER—*Fertilizers and Feeding Stuffs Act*, 1906 (6 *Edw. 7, c.* 27)—*Person entrusted with charge or custody of article—Carrier.*] *K.* was a person appointed by the Department of Agriculture and Technical Instruction for Ireland as their sampler, to take samples of fertilizers and feeding stuffs for the purposes of the Fertilizers and Feeding Stuffs Act, 1906. The defendants had in their possession in Cork a quantity of manure, consigned from Liverpool to merchants in Ireland. Their possession was solely as carriers. *K.* applied to the defendants for permission to take samples of the manure, but the defendants refused to allow him to do so:—*Held*, that *K.* was an "official sampler" within the meaning of section 8, sub-section (*a*), of the above-mentioned Act; that the defendants were persons entrusted for the time being with the charge or custody of an article within the meaning of the sub-section; and that the defendants were guilty of an offence under the section. *Department of Agriculture and Kennedy, Complainants*; *City of Cork Steam Packet Co., Defendants* - - - - - K.B. 479

ORDERS, GENERAL—1905 (22nd February), III., R. 6 - - - - - 104
See Specially Indorsed Writ.

—— IX., R. 1 - - - - - - 760
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—— XIV., R. 1 - - - 104, 500
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Specially Indorsed Writ.

—— XIX., Rr. 6, 7 - - - - - 181
See Particulars.

—— XXVII., R. 17 - - - - - 1
See Setting Aside Judgment.

—— LXIV., R. 15 - - - - - 698
See Continuing Proceedings.

—— LXV., R. 65 (41), (42) - 655, 670
See Bond.

—— LXVII., R. 5 - - - - - 698
See Continuing Proceedings.

—— 1906, Labourers Order, R. 60 (1) - 379
See Compulsory Purchase.

PARLIAMENT—*Local Registration of Title (Ireland) Act*, 1891—*Devolution of Title from testate registered owner—Proof of will—Evidence—Parliamentary franchise—£5 freeholder*—13 & 14 *Vict. c.* 69, *s.* 2.] On the death of an owner of land registered under the Local Registration of Title (Ireland) Act, 1891, the devolution of his estate in the lands must be proved in accordance with the provisions of the Act, and probate or letters of administration must be produced. Proof of his will by the witnesses, as in case of real estate, is inadmissible. Where *A.* and *B.* claimed the franchise as £5 freeholders, under the devise in a will of a registered owner:—*Held*, that the Revising Barrister was right in rejecting evidence by the attesting witnesses of the due execution of the will. *Lynch* v. *Harper* - - - App. 63

2. —— *Power of Revision Court to amend—Evidence relevant to claim as stated, showing a different qualification—Successive occupation*—48 & 49 *Vict. c.* 17, *s.* 4.] Where, in a claim or list, a voter's qualification is, without *mala fides* or anything to mislead, incorrectly stated, and evidence

PARLIAMENT—*continued.*
relevant to the qualification as originally described shows that he is entitled to the franchise under another qualification, the Revision Court may and ought to amend, under the Parliamentary Registration (Ireland) Act, 1885, section 4. Accordingly where the qualification of a householder was described as *A* from *B*, and it appeared that the voter occupied *A* during the whole of the qualifying period, the Court being of opinion that no one was misled or prejudiced, and that the misdescription was made *bona fide*:—*Held*, that the Revision Court had power to amend, and that the householder was entitled to the franchise. *Gillespie's Case* (Lawson's Notes of Cases, 1885-1893) followed. *M'Laughlin* v. *Swan*; *Sume* v. *Bates* - - - - - - - - APP. 48

PARTICULARS—*Practice—Contributory negligence—Inevitable accident—G. O. XIX., Rr.* 6, 7.] Where, in an action for negligence, the defendant pleads contributory negligence, the Court will not compel him to give particulars of such plea, unless the plaintiff makes out a special case for the granting of particulars. *Toppin* v. *Lord Mayor, &c., of Belfast* - - - - - - - APP. 181

PASSENGER—Railway—Alleged negligence in shutting door - - - - - 330
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—— Tramcar—Negligence in going to platform while vehicle is in motion - - 13
See TRAMWAY.

PETITION—Evicted Tenants Act, 1907, s. 2 (5) - - - - - - 542, 556
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PETITION OF RIGHT—Parliamentary grants—Money in the hands of the Crown—"The King can do no wrong"—Purchase of Land (Ireland) Act), 1891, s. 6 (6) [199
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PETTY SESSIONS.
See JUSTICES.

PLATFORM—Tramcar—Passenger's negligence
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PLEADING—Contributory negligence—Particulars - - - - - - 181
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POLICY OF INSURANCE—"Interest purchased or provided by deceased" 597
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POOR LAW—Guardians—Alteration of Dispensary Districts — Requisition — Sealed order - - - - - 354, 369
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POSSESSION—Covenant to deliver up—Surrender - - - - - - 474
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POWER—Limited—Execution - - 521
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PRACTICE—Amendment of particulars at trial—Adjournment refused—Surprise
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—— Case stated by Justices—Service - 681
See JUSTICES. 4.

—— Certiorari—Discretion of Court
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JUSTICES. 2.

—— Continuing proceedings—Lapse of a year—Notice of motion required - - 698
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—— Costs.
See COSTS.

—— County Court—Action which might have been brought in—Bond in penal sum—Amount recoverable under £50 655, 670
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—— County Court — Interpleader — Sessions to which civil bill is returnable - 589
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—— County Court—Renewal of decree—Affidavit - - - - - - 290
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—— County Court — Undefended civil bill ejectment — Non-payment of rent — Proofs. - - - - - - 503
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—— Irregularity—Election petition—Prematureness—Waiver - - - - 96, 103
See ELECTION PETITION.

—— Judgment — Alleged to be fraudulent — Motion by creditor—Issue - 1
See SETTING ASIDE JUDGMENT.

—— Judgment—Motion for—After close of pleadings—Costs - - - - - 500
See JUDGMENT.

—— Judgment—Motion for—Ejectment on notice to quit—Arrears of rent - - 104
See SPECIALLY INDORSED WRIT.

—— Judgment — Setting aside — Fraud on creditor - - - - - - 1
See SETTING ASIDE JUDGMENT.

—— Judgment — Varying — Costs — Action on bond - - - - - - 667
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—— Mandamus—Joint committee of management of district lunatic asylum 276, 284
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—— Particulars—Contributory negligence 181
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—— Petition of right—Grant — Money of suppliants in hands of the Crown - 199
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—— Probate—Question of revocation—Construction—Inspection of original will—Punctuation, capitals, parentheses - 521
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—— Prohibition—Estates Commissioners—Excess of jurisdiction - - - 542, 556
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—— *Quo warranto*—Relator—Interest - 412
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—— Remitting action to County Court.
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—— Specially indorsed writ—Ejectment on notice to quit—Arrears of rent - - 104
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—— Staying proceedings — Contract to refer matters in dispute to English Court 120
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PRINCIPAL AND SURETY
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PROBATE—Two testamentary instruments 521
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PROHIBITION—Estates Commissioners—Exercise of compulsory powers — Evicted Tenants Acts—Excess of jurisdiction
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PROSECUTION—Medical Act (21 & 22 Vict. c. 90), s. 40—Right of member of public to prosecute - - - - - 681
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PUBLIC HEALTH ACT, 1878 — Destruction of carcase as unfit for human food—Compensation—Arbitration—ss. 217, 274
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PUBLIC-HOUSE—License—Transfer - 132
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—— Structural separation — Saturday night — Sunday - - - - - - 626
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PUNCTUATION—Original will—Construction
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QUO WARRANTO—Relator—Interest 412
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RACK-RENT—Expiration of lease - 436
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RAILWAY — Alleged negligence in shutting door—Injury to passenger - 330
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—— Evidence of negligence—Defective fence—Turntable - - - - - 499
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RECEIPT—For two sums — Contemporaneous acknowledgment of payment of one 246
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REGISTRAR OF TITLES—*Clerk of the Crown and Peace—East and West Riding of the County of Cork—Riding separate counties—Relation*—Quo warranto—*Order in Council—County Officers and Courts (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 8—*Petty Sessions Clerks and Fines Act*, 1878 (41 & 42 *Vict. c.* 69), *s.* 12—*Local Registration of Title (Ireland) Act* (54 & 55 *Vict. c.* 66), *s.* 4 (5).] By the Local Registration of Title (Ireland) Act, 1891, s. 4 (5), each local office shall be under the management and control of the Clerk of the Crown and Peace of the county, except in certain cases not material. The county of Cork is divided into two ridings, the East Riding and West Riding, and, under the powers conferred by the County Officers and Courts (Ireland) Act, 1877, and the Petty Sessions Clerks and Fines Act, 1878, by Order in Council, dated 1st March, 1879, reciting that the offices of Clerk of the Crown for the county of the city of Cork, Clerk of the Crown for the county of Cork, and Clerk of the Peace for the county of Cork, were then vacant, and that the Clerk of the Peace for the county of the city of Cork was willing to accept the office of Clerk of the Crown for the county of the city, and it being deemed expedient that the offices should be united, it was directed that the offices of Clerk of the Crown and Clerk of the Peace for the county of the city of Cork, and the office of Clerk of the Crown and Peace for the East Riding of the county of Cork, should from thenceforth be and remain united, under the style and title of Clerk of the Crown and Peace for the county of the city of Cork and East Riding of the county of Cork; and it was further directed that the offices of Clerk of the Crown and of Clerk of the Peace of and for the West Riding of the county of Cork should be united, "under the style and title of Clerk of the Crown and Peace of and for *the county of Cork*." When a vacancy occurred in the office of Local Registrar of Titles for the county of Cork by the death of *O'G.*, Clerk of the Crown and Peace of and for the county of the city of Cork, and the East Riding of the county of Cork, his successor in the latter office, *W.*, was appointed by the Lord Chancellor "Local Registrar of Titles in Cork, in place of the late *O'G.*" *F.*, who at the time filled the office of Clerk of the Crown and Peace of and for the West Riding of the county of Cork, under the style and title of Clerk of the Crown and Peace of and for *the county of Cork*, claimed the office of Local Registrar of Titles as being the person referred to in the provision of the Local Registration of Title (Ireland) Act, 1891, that each local office shall be under the management and control of the Clerk of the Crown and Peace for the county:—*Held*, that, although the Local Registration of Title (Ireland) Act, 1891, does not of itself contain any definition clause

REGISTRAR OF TITLES—*continued.*

indicating that "county" may include riding of a county, still, upon the reading of the County Officers and Courts (Ireland) Act, 1877, and the Petty Sessions Clerks and Fines Act, 1878, the word "county" is to be treated as so defined in the Local Registration of Title Act, for the purpose of which the two ridings of the county of Cork are, accordingly, to be treated as two separate counties. *Held*, therefore, that the words of the Order in Council of the 1st March, 1879, giving to the Clerk of the Crown and Peace for the West Riding of the county of Cork the style and title of Clerk of the Crown and Peace of and for the *county of Cork*, under which *F.* claimed the office of Registrar of Titles for the whole county of Cork, were of no effect, and that *F.* held no more extended office than that of Clerk of the Crown and Peace for the West Riding of the county of Cork. *Held*, also, that the local office in the county of the East Riding of Cork should be under the control and management of *W.*, and that the local office in the county of the West Riding of Cork should be under the control and management of *F.*, unless, in the opinion of the Lord Chancellor, *F.* was not qualified to discharge the duties of the office. *Held*, also, that *F.*, although failing as to the full extent of his claim, had such an interest in the subject-matter as to constitute him a complete relator to file an information in the nature of a *quo warranto* against *W.* *The King* (*Fitzgerald*) v. *Wright* [K. B. 412

RELATOR—Competence of—Quo warranto 412
See REGISTRAR OF TITLES.

REMITTING ACTION TO COUNTY COURT—*Practice—Time for serving notice of motion—Acceptance of service of writ by solicitor—Form of—Appearance—R. S. C., I.* (1905, 22*nd February*), *Order IX, Rule* 1.] When service of a writ of summons is accepted by a defendant's solicitor in the following terms:—"I accept service of this writ on behalf of the defendant, and undertake to enter an appearance thereto," the time within which the defendant may move to have the action remitted to the County Court, under section 5 or 6 of the Common Law Procedure Act (Ireland), 1870, runs from the date of the entry of the appearance, and not from the date when service is accepted. *M'Farland* v. *Lloyd* (30 L. R. Ir. 248) followed. *Harrison and another* v. *Lundy* [K.B. 760

—— Alleged negligence—Railway Co.—Injury to passenger by shutting door - 330
See NEGLIGENCE. 2.

RENEWAL OF DECREE — *County Court—Affidavit made out of Court— Statute — Implied repeal—*"Generalia specialibus non derogant"—14 *&* 15 *Vict. c.* 57, *ss.* 140, 141, 142—27 *&* 28 *Vict. c.* 99, *s.* 45—40 *&* 41 *Vict. c.* 56, *s.* 70.] A renewal of a civil-bill decree may be granted on an affidavit made out of Court. The provisions of sections 140 and 141 of 14 & 15 Vict. c. 57, requiring such affidavit to be made before the County Court Judge in open Court, are impliedly repealed by 27 & 28 Vict. c. 99, s. 45, and 40 & 41 Vict. c. 56, s. 70. *Kelly* v. *Beggan* - - - K.B. 290

RENT—Advance as security—Set off—Covenant consistent with judicial tenancy - 690
See FAIR RENT.

—— Arrears—Ejectment on notice to quit—Judgment on motion - - - 104
See SPECIALLY INDORSED WRIT.

—— Bankruptcy of tenant—Landlord's right to six months' arrears - - - 114
See BANKRUPTCY. 1.

—— Rack - - - - - - 436
See SUCCESSION DUTY.

REPAIRS—Covenant—Breach—Bankruptcy of covenantor - - - - 185
See BANKRUPTCY. 2.

—— Roof—Death of workman - - 108
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—— Sea-wall—Contribution—Lease — Covenant running with land - - - 58
See COVENANT. 2.

REPEAL—Statute—Implication - - 290
See RENEWAL OF DECREE.

REQUISITION—To guardians—Alteration of dispensary district - - 334, 369
See DISPENSARY DISTRICT.

REVENUE—Estate duty—"Interest purchased or provided by the deceased" - 597
See ESTATE DUTY.

—— Stamp—Receipt—Two sums - - 246
See STAMP.

—— Succession duty—Expiration of lease—Rack-rent—Increased value - - 436
See SUCCESSION DUTY.

REVOCATION OF WILL—*Two partly inconsistent wills admitted to probate — Execution of limited power of appointment— Intention — Power to look at original will.*] Where a subsequent testamentary paper is only partly inconsistent with one of earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both papers are admitted to probate. A testatrix having property of her own, and a power under the will of her sister *R.* to appoint all her property amongst brothers or sisters, or children of a deceased brother or sister, executed the power by giving pecuniary legacies to nephews and nieces, and appointing the residue to her nephew *F.*, to whom she left the

REVOCATION OF WILL—*continued.*
residue of her own property, including "Tramore House and grounds," and appointed executors. By a will in her own handwriting, made two years later, containing no express reference to the earlier will, the testatrix purported to exercise the power of appointment, increasing and varying the pecuniary legacies, but omitting, as the Court held, to name a residuary legatee. She left the residue of her own property to her nephew *T.*, in the hope that he would find it for his advantage to live in "Tramore House." There was no appointment of executors. Tramore House and grounds belonged, as to three-fourths, to the testatrix, and, as to one-fourth, to her sister *R*:—*Held*, that there was no intention to revoke the appointment of executors and of the residue of *R's* property to *T.*, and that the two wills could stand together, and should be admitted to probate. *Lemage* v. *Goodban* (L. R. I. P. & D. 57), *Leslie* v. *Leslie* (I. R. 6 Eq. 322), and *Townsend* v. *Moore* ([1905] P. 66) followed. In order to construe a doubtful clause in a will, the Court may look at the original will to ascertain the punctuation, the introduction of capital letters, parentheses, and other marks, indicating where a sentence begins or ends. *Manning* v. *Purcell* (7 D. M. & G. 55; 24 L. J. Ch. 523) and *Turner* v. *Hellard* (30 Ch. D. 390 followed. *Reeves* v. *Reeves* - K. B. (PROB.) 521

ROAD—Order on owner to prune hedges and trees—Subsequent order authorizing road contractor to do so - - - - 686
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ROOF—Business premises—Death of workman while repairing - - - - 108
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RURAL COUNCIL—Labourers Acts—Compulsory purchase—Arbitration - 379
See COMPULSORY PURCHASE.

—— Surcharge — Local Government Acts, 1871, s. 12; 1902, s. 20 - - - 333
See AUDITOR.

SALMON — Possession of — Close season for netting, but not for angling - 25
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SAMPLER—Official—6 Edw. 7, c. 27 - 479
See OFFICIAL SAMPLER.

SATURDAY NIGHT — Closing — Business premises not structurally separated from public-house - - - - - 626
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SEA-WALL—Repairs—Contribution to—Lease—Covenant running with land - 58
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SERVICE—Case stated by Justices - 681
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—— Notice of intention to proceed—Ord. LXVI., R. 15 - - - - - - 698
See CONTINUING PROCEEDINGS.

SERVICE—*continued.*

—— Summons — Desertion of wife — Divisional Justice of Dublin Metropolitan Police District—Jurisdiction - - 302
See JUSTICES. 3.

—— Writ of summons—Acceptance by solicitor [760
See REMITTING ACTION TO COUNTY COURT.

SESSIONS — Interpleader—Civil bill — When returnable - - - - - 589
See COUNTY COURT. 1.

SETTING ASIDE JUDGMENT—*Practice—Fraud—Jurisdiction of the Court upon motion—Issue to try the question of fraud.*] A Court of the King's Bench Division has jurisdiction, upon motion, to set aside a judgment, upon the ground that it is collusive and fraudulent against creditors of the defendant, provided that fraud is clearly proved; but where the evidence before the Court on the hearing of the motion is such as reasonably to suggest fraud, though not to establish it, the Court will direct an issue to try the question of fraud. *Per* Gibson and Dodd, JJ.: The jurisdiction to set aside a judgment, or to direct such an issue, is part of the inherent jurisdiction of the Court, and does not depend on Order XXVII., Rule 17. *Per* Kenny, J.: (1) The Court has inherent jurisdiction to deal with its own record at the instance of any party affected by it, when it is improperly placed on the files of the Court. (2) The application of Order XXVII., R. 17, is not confined to ejectments. *Harrod* v. *Benton* (8 B & C. 217) followed. *Mehaffey* v. *Mehaffey* ([1905] 2 I. R. 292) and *Jacques* v. *Harrison* (12 Q. B. D. 165) discussed. *Nixon* v. *Loundes* [K. B. 1

SHANNON, RIVER—By-law—Navigation—"Frame or engine"—*Ultra vires* - 718
See BY-LAW.

SPECIALLY INDORSED WRIT—*Practice - Motion for final judgment—Action for the recovery of land—Notice to quit—Claim for possession and arrears of rent—R. S. C., I.* (1905, 22*nd February*), *Ord. III., Rule* 6; *Ord. XIV., Rule* 1.] In an action for the recovery of land by a landlord against a tenant whose term has been duly determined by notice to quit, where the writ is specially indorsed, under Order III., Rule 6, with a claim for possession and for arrears of rent up to the expiration of the notice to quit, if, on a motion for final judgment for possession and for the arrears of rent, the plaintiff shows that he is entitled, he should be given leave to mark final judgment for both. *Hamill* v. *M'Donnell* [K.B. 104

STAMP—*Revenue—Receipt—Stamped receipt for two sums—Contemporaneous unstamped receipt for one of such sums—Stamp Act*, 1891 (54 & 55 *Vict.* c. 39), ss. 101, 103.] The defendant gave *N.* a duly stamped receipt for a sum paid by *N.* for rent and goods supplied, and at the same time gave *N.* (as the defendant alleged, for book-keeping purposes only) a separate document, purporting to be a receipt for the rent alone, which exceeded £2:—*Held*, by the Court of Appeal (reversing the decision of the King's Bench Division), that the latter document required a stamp. *Attorney-General* v. *Ross* - - - - - APP. 246

STATUTE—Implied repeal - - - 290
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STATUTES—6 Geo. 4, c. 81—Excise duties, s. 21 - - - - - - 132
See LICENSING ACTS. 2.

6 & 7 Wm. 4, c. 116—Grand Juries, s. 135 125
See MALICIOUS INJURY. 1.

—— ——, s. 137 - - - - - - 674
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5 & 6 Vict. c. 24—Dublin Police, s. 49 - 302
See JUSTICES. 3.

5 & 6 Vict. c. 106—Fisheries, s. 36 - - 25
See FISHERY ACTS.

13 & 14 Vict. c. 69—Parliamentary voters, s. 2 53
See PARLIAMENT. 1.

14 & 15 Vict. c. 57—Civil Bill Courts, ss. 140, 142
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—— ——, s. 150 - - - - - - 589
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14 & 15 Vict. c. 68—Medical charities, s. 6 354,
See DISPENSARY DISTRICT. - [369

14 & 15 Vict. c. 92—Summary jurisdiction s. 9
See JUSTICES. 5. [686

14 & 15 Vict. c. 93—Petty Sessions, s. 20 400
See JUSTICES. 1.

16 & 17 Vict. c. 51—Succession Duty, s. 20 436
See SUCCESSION DUTY.

18 & 19 Vict. c. 114—Transfer of licenses, s. 1
See LICENSING ACTS. 2. [132

20 & 21 Vict. c. 43—Justice of the Peace 681
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20 & 21 Vict. c. 60—Bankruptcy, s. 149 - 185
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21 & 22 Vict. c. 90—Medical Act, s. 40 - 681
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23 & 24 Vict. c. 154—Landlord and Tenant, s. 12
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24 & 25 Vict. c. 97—Malicious injuries, s. 16 125
See MALICIOUS INJURY. 1.

27 & 28 Vict. c. 99—Civil Bill Courts, s. 45 290
See RENEWAL OF DECREE.

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27 & 28 Vict. c. 99, s. 46 - - - - 503
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30 & 31 Vict. c. 118—Lunacy, s. 6 276, 284
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34 & 35 Vict. c. 109—Local Government, s. 12
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35 & 36 Vict. c. 58—Bankruptcy, s. 46 - 185
See BANKRUPTCY. 2.

37 & 38 Vict. c. 69—Licensing, s. 12 - 132
See LICENSING ACTS. 2.

38 & 39 Vict. c. 63—Food and drugs - 490
See FOOD.

40 & 41 Vict. c. 56—County Officers and Courts, s. 8 - - - - - - 412
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—— ——, s. 70 - - - - - - 290
See RENEWAL OF DECREE.

41 & 42 Vict. c. 52—Public Health, ss. 217, 274
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41 & 42 Vict. c. 69—Petty Sessions Clerks and Fines, s. 12 - - - - 412
See REGISTRAR OF TITLES.

44 & 45 Vict. c. 49—Land Law, s. 21 - 690
See FAIR RENT.

48 & 49 Vict. c. 17—Registration of voters, s. 4
See PARLIAMENT. 2. [48

49 & 50 Vict. c. 52—Married women (Maintenance in case of desertion), s. 1 - - 302
See JUSTICES. 3.

50 & 51 Vict. c. 33—Land Law, s. 1 - 690
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—— ——, s. 7 - - - - - - 503
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54 & 55 Vict. c. 39—Stamps, ss. 101, 103 246
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54 & 55 Vict. c. 48—Purchase of land, ss. 5 (1), 6 (6) - - - - - - 199
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54 & 55 Vict. c. 66—Local Registration of Title, s. 4 (5). - - - - - 412
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—— ——, s. 84 - - - - - - 53
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57 & 58 Vict. c. 30—Finance, ss. 1, 2, sub-s. 1 (d) - - - - - - 597
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59 & 60 Vict. c. 47—Land Law - - 503
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61 & 62 Vict. c. 37—Local Government, s. 5 125
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—— ——, s. 9 (9) - - - 276, 284
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—— ——, ss. 48 (1), (2), 49 - - - 199
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—— ——, s. 84 - - - - 276, 284
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62 & 63 Vict. c. 51—Food and Drugs - 490
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2 Edw. 7, c. 38—Local Government, s. 20 333
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6 Edw. 7, c. 27—Fertilizers and Feeding Stuffs
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6 Edw. 7, c. 37.—Labourers, s. 15 - - 199
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6 Edw. 7, c. 39—Intoxicating liquors, - 626
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6 Edw. 7, c. 50—Workmen's Compensation, s. 13
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7 Edw. 7, c. 56—Evicted Tenants, ss. 1, 2
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8 Edw. 7, c. 22—Evicted Tenants, s. 1 542, 556
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STATUTORY TENANCY—Covenant in lease applicable to - - - - 690
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SUB-TENANCY — Suretyship — Lease — Warranty or covenant whether implied—Express covenant - - - 510
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SUCCESSION DUTY—*Inland Revenue—Determination or expiration of lease—Succession duty on increased value of lands demised—"Lease purporting at the date thereof to be a lease at rack-rent"—Lease for ninety-nine years at a fixed rent—Covenant by lessee to expend a specified sum in building on the demised premises within a specified time—Proviso that, on breach of such covenant, the lease should be void, and that the lessee should hold the demised premises for a term of twenty-one years from the date of the demise, the rent remaining unchanged.*] Portions of undeveloped land adaptable as sites for villa residences were let in lots on leases for ninety-nine years. Each lease reserved a fixed sum as rent, and contained a covenant by the lessee to expend a specified sum in building on the demised premises within five years from the date of the demise. Each lease also contained a proviso that on breach of the aforesaid covenant the lease should become void, and that, in such case, the lessee should hold the demised premises for twenty-one years from the date of the demise, the rent remaining unchanged. The covenants having been performed, and the lands having been held by the lessees for the full term of ninety-nine years, on information by the Attorney-General for a declaration that, upon the expiration of the leases in question, the successor of the lessor was bound to deliver a succession account, under the

SUCCESSION DUTY—*continued.*
Succession Duty Act, 1853 (16 & 17 Vict. c. 51):—*Held*, by the King's Bench Division, that the leases were not "leases purporting at the date thereof to be leases at a rack-rent" within the meaning of section 20 of the said Act, and that the successor of the lessor was bound to deliver an account, and to pay the duty imposed by the said Act. *Attorney-General* v. *Earl of Longford* [K.B. 436

SUMMONS — Service — Divisional Justice of Metropolitan Police District — Jurisdiction - - - - - - 302
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SUNDAY — Closing — Business premises not structurally separated from public-house
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SURCHARGE—Rural Council—Local Government Acts, 1871, s. 12; 1902, s. 20 333
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SURETY—Fidelity bond - - 700, 712
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SURPRISE—Amendment of particulars—Date—Refusal of adjournment - 445, 469
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SURRENDER—*Lease—Possession.*] Leasehold premises were vested in the defendants, as trustees for debenture-holders of a Company, who were the original lessees. Subsequently, in a debenture-holder's action against the Company and the defendants, a receiver was appointed over the Company's property, and, by an order in the suit, the defendants were empowered to "execute a surrender" of the leasehold premises to the lessor, the latter agreeing to accept the surrender on payment by the defendant of £100 in discharge of all claims in respect of the breach of any covenant in the lease. The defendants executed the deed of surrender, and paid the consideration money, but failed to yield up clear possession of the demised premises:—*Held*, that the lessor was entitled to maintain an action for damages for breach of contract to deliver up clear possession of the premises. *D'Arcy* v. *Lord Castlemaine and Sir C. Cameron* APP. 474
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TIME — Appointment of arbitrator — Public Health Act, 1878, s. 217 - - 30, 40
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—— Election petition—Alleged prematureness—Waiver - - - - - 96, 103
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TRAMWAY—*Negligence—Action for — Tramway Company and passengers — Liability for accident occasioned by passenger going upon platform while car is in motion*—Volenti non fit injuria *Effort to stop car in order to alight—Stopping-places — Absence of conductor from platform—Disregard of passenger's signal.*] A passenger on a tramcar who, while the car is in motion, leaves his seat, and, in the absence of the conductor, goes upon the platform for the purpose of stopping the car by ringing the bell, does so at his own risk, in regard to an accident caused by the ordinary motion of the tramcar. *M.*, a passenger on a tramcar, the property of a Tramway Company, told the conductor shortly after he entered the car that he wished to alight at *B.* Avenue, a place then about two miles distant. There was no evidence that *M.* subsequently spoke to the conductor on the subject. When the car reached *B.* Avenue, the conductor was on the roof collecting fares. The car was travelling at a rapid, but not excessive, pace, and continued its course. *M.*, in the absence of the conductor, left the interior of the car, and went out on to the platform to stop the car by ringing the bell. While he was doing so, the car swerved, and he was jerked from the platform to the road, sustaining injuries. The swerve which caused *M.*'s fall was not exceptional, nor was there anything defective in the machinery or construction of the car. There was no evidence that *M.* gave the proper signal for stopping the car. *B.* Avenue was a place where cars were stopped on request, but not otherwise. In an action by *M.* against the Tramway Company for negligence:—*Held*, (1) that, in the absence of reasonable notice to the conductor of the plaintiff's wish to alight, there was no evidence of negligence on the part of the conductor; (2) that, even assuming that both the conductor and the driver were negligent in not stopping the car, such negligence on their part was not the proximate cause of the accident to the plaintiff. *Held*, also, by Boyd and Wright, JJ., that the driver was not negligent, there being no evidence that the proper signal for that purpose was given to him. *Rocco* v. *Dublin United Tramway Co.* (unreported.—C. A., November 10, 1905; *infra*, pp. 15 and 16, note) followed. *Hall* v. *London Tramways Co.* (12 T. L. R. 611) distinguished. *Martin* v. *Dublin United Tramways Co.* - - K. B. 13
TRANSFER—Publican's license—Surrender of lease—New tenant - - - 132
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—— "Employed otherwise than for the purposes of the employer's trade or business"—6 Edw. 7, c. 58, s. 13 - - 108
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—— "Hours aforesaid"—Intoxicating Liquors (Ireland) Act, 1906, s. 2 - - 626
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—— "Interest purchased or provided by the deceased"—Finance Act, 1894, ss. 1, 2, sub-sect. (d) - - - - 597
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—— "Proceedings"—61 & 62 Vict. c. 37, s. 9 (9) - - - - 276, 284
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WORKMAN — *Workmen's Compensation Act*, 1906 —"*Employed otherwise than for the purposes of the employer's trade or business*"—*House exclusively used and occupied for business—Repairs to roof.*] A labourer was employed to assist in repairing the roof of a house in which drapery, grocery, and hardware business was carried on by the employers. The employment was casual. The assistants in the business occupied the dwelling part of the house over the shop. It was the duty of the manageress to have the premises in proper condition for carrying on the business. While engaged in repairs to the roof the labourer met with the accident which caused his death:—*Held*, that at the time of his death he was employed for the purposes of the employer's business, and that his dependants were entitled to compensation under the Workmen's Compensation Act, 1906. *E., J. & A. Johnston, Applicants*; *Monasterevan General Store Co., Respondents* - - - - App. 108

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